In Defense of the Constitutionality of Critically Discussing Religion and Ethics in Schools in Light of Free Exercise and Parental Rights

MICHAEL YOUNG*

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* J.D. Candidate, 2010, The Ohio State University Moritz College of Law. B.A., Philosophy, *magna cum laude*, The College of Wooster. The author can be reached by email at immichaelyoung@gmail.com. The author gratefully acknowledges the following individuals for their thoughtful comments and reviews of earlier drafts of this work: John Biancamano, Mahmoud El-Youssef, Prof. David Goldberger, and Moran Nussbaum. Any errors and faults in this work are the author's alone.

I. INTRODUCTION

Suppose a state required all secondary students—whether private, public, or home-schooled—to take a course that might be called "Critical Discussions." In this course, ethical, political, and religious themes and topics would be discussed in an analytical way. Ethical dilemmas would be posed for class discussion, and the truth value of religious claims debated. Students would be encouraged to imagine viewpoints other than their own, although not in a way that reduced all ethical principles and values to mere subjective preference. Every student would be expected to participate in the discussion, which would be guided by a teacher with some basic background knowledge of the class topics.

Assuming that the above-described program would face certain opposition from some religious objectors, this Note aims to assess the constitutionality of such a course in the event that a state would make it mandatory.

At present, Critical Discussions is a fiction; no state mandates such a dedicated course, although some curriculums do engage broader ethical themes or approach religion in a factual way. For example, some states require the study of religion as part of a history or social studies curriculum.[1] In other systems, a conscious attempt to imbue students with traditional virtues is made.[2] None of these programs, however, mandates participation in a separate course dedicated solely to the open discussion of controversial ethical and religious topics.[3]

Nevertheless, this fictional Critical Discussions course tracks real proposals and existing non-U.S. curriculums endorsing the idea of a dialogic ethics education. Academic philosophers, for example, have sometimes advanced critical classroom engagement with big questions as part of a

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[1] *See, e.g.*, CAL. DEP'T OF EDUC., HISTORY—SOCIAL SCIENCE CONTENT STANDARDS FOR CAL. PUB. SCHS. 18, 24 (Bob Klingensmith, ed., 1998), *available at* http://www.cde.ca.gov/be/st/ss/documents/histsocscistnd.pdf; CONN. STATE DEP'T OF EDUC., DIV. OF TEACHING AND LEARNING, CONN. SOC. STUDIES CURRICULUM FRAMEWORK 152 (1998), *available at* http://www.sde.ct.gov/sde/lib/sde/PDF/Curriculum/Curriculum_Root_Web_Folder/frsocst.pdf.

[2] *See, e.g.*, Ark. Dep't of Educ., Character-Centered Teaching, http://arkansased.org/teachers/cct.html (last visited Aug. 13, 2009); Bureau of Curriculum and Instruction, Fla. Dep't of Educ., Character Education, http://www.fldoe.org/bii/Curriculum/Social_Studies/ ce.asp (last visited Aug. 20, 2009).

[3] One state, Maine, however, does profess a commitment to promoting "ethical reasoning" skills across the high school social studies curriculum. ME. DEP'T OF EDUC., LEARNING RESULTS: PARAMETERS FOR ESSENTIAL INSTRUCTION 108 (2007), *available at* http://www.maine.gov/education/lres/pei/ch132_0708.pdf.

separate course of "Philosophy for Children."[4] Although not explicitly connected to the "Philosophy for Children" movement, a "humanist applied ethics" curriculum with some features similar to Critical Discussions may be adopted for all schoolchildren in Victoria, Australia.[5] In 2004, a British think-tank held a conference on religious education where some participants proposed questioning the truth of religious claims in the classroom.[6] In Berlin in 2005, dedicated ethics and religious coursework from a secular, non-sectarian viewpoint became compulsory.[7] Stephen Law, a prominent British philosopher, proposes mandatory class time in which students can be taught ethics in a liberal, non-authoritarian way through a guided discussion by a teacher with some basic philosophical competence.[8]

These proposals and programs generally involve questioning religion in some broad senses. For some of the above programs, the questioning of

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[4] "Philosophy for Children" encompasses more than dialogue about ethical controversies, but can include such discussion. *See, e.g.*, Harry Brighouse, *The Role of Philosophical Thinking in Teaching Controversial Issues*, *in* PHILOSOPHY IN SCHOOLS 61, 62 (Michael Hand & Carrie Winstanley eds., 2008) ("Philosophical education concerning controversial issues is urgently important in a democracy."). *See generally* PHILOSOPHY IN SCHOOLS, *supra* (a collection of essays from philosophers discussing and arguing in favor of "Philosophy for Children" programs, or aspects of such programs).

[5] Michael Bachelard, *Religion in Schools to Go God-Free*, THE AGE, Dec. 14, 2008, at 1, *available at* http://www.theage.com.au/national/religion-in-schools-to-go-godfree-20081213-6xxs.html?page=-1 (making clear, however, that objecting religious parents could opt out); *see also* Harry Gardner, Ethical Education, http://www.ethicaleducation.net/index.php?pr=Home_Page (last visited Aug. 20, 2009) [hereinafter Gardner, Ethical Education] (website devoted to and describing the curriculum). In private correspondence with the author, Dr. Gardner acknowledged the curriculum's underlying embrace of non-authoritarianism about ethics education, classroom discussion, and the development of ethical imagination. Letter from Harry Gardner to Michael Young (Dec. 26, 2008) (on file with the author).

[6] INST. FOR PUB. POL'Y RESEARCH, WHAT IS RELIGIOUS EDUCATION FOR?: GETTING THE NATIONAL FRAMEWORK RIGHT 6, 15 (2004), *available at* http://www.ippr.org/uploadedFiles/research/events/Education/RE%20Event%20Report.pdf [hereinafter IPPR]. The idea of questioning the truth claims of religion in religion classes was ultimately rejected. *See* QUALIFICATIONS AND CURRICULUM AUTHORITY, RELIGIOUS AUTHRITY, RELIGIOUS EDUCATION: THE STATUTORY NATIONAL FRAMEWORK 36–37 (2004), *available at* http://www.qcda.gov.uk/libraryAssets/media/9817_re_national_framework_04.pdf.

[7] Hardy Graupner, *Row Erupts Over Ethics and Religion Ruling*, DEUTSCHE WELLE, Apr. 14, 2005, http://www.dw-world.de/dw/article/0,,1551981,00.html. The Berlin program, opposed by religious groups, faced a popular referendum in April 2009, but was not defeated. *Berlin Referendum Fails at the Polls*, SPIEGEL ONLINE INT'L, Apr. 27, 2009, http://www.spiegel.de/international/germany/0,1518,621281,00.html.

[8] STEPHEN LAW, THE WAR FOR CHILDREN'S MINDS, 165–66 (Routledge 2006) [hereinafter LAW, CHILDREN'S MINDS].

religion amounts to discussing ethics or ethical topics in a way that does not necessarily assume the truth of religion or religious claims.[9] Others propose to literally question religious claims outright as part of a dedicated course.[10] Because of this involved questioning, these proposals and programs have met hostility from those fearing an attempt to undermine their particular religious or ethical views.[11] In its starkest form, the fear is that such courses would corrode children's particular religious faith.[12]

As used herein, "Critical Discussions" is simply this Note's label for any high school ethics course containing those questioning features of a secular ethics course feared and opposed by religious objectors. This fiction means to conveniently capture the critical (and potentially objectionable) features of the particular proposals and courses. For the sake of sharpening the ensuing discussion, it should be assumed that students in Critical Discussions would be asked to question religion in both of the senses specified above: by sometimes discussing ethics in a way that does not assume the truth of religious claims, and by sometimes literally being posed questions for discussion such as, "Does God exist?"

Additionally, it should be assumed that students in the Critical Discussions class would not be coerced to accept or appear to accept any particular ethical or religious viewpoint. For example, teachers would have the responsibility to curb any kind of class discussion between students that devolved into personal attacks or other forms of illegitimate coercion.[13]

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[9] *See generally* Gardner, Ethical Education, *supra* note 5.

[10] IPPR, *supra* note 6, at 15.

[11] *See, e.g., id.*; Bachelard, *supra* note 5; Sophie York Turramurra, *Letter to the Editor*, SYDNEY MORNING HERALD, Aug. 21, 2007, at 14 (expressing the view that non-authoritarian ethics education is improperly intolerant of religion); Editorial, *Christianity Is Outclassed,* TELEGRAPH, Feb. 16, 2004, http://www.telegraph.co.uk/comment/telegraph-view/3602661/Christianity-is-outclassed.html (objecting to the idea that children should question received religious beliefs).

[12] *See, e.g.*, The Subversion of Religion and Morals (continued), http://www.melaniephillips.com/diary/?p=267 (Feb. 17, 2004), http://www.melaniephillips.com/diary/archives/000330.html. Melanie Phillips, a columnist for the British *Daily Mail*, rejects the secular dialogic approach to ethics and religious education suggested at the IPPR conference: "the real agenda is not to expand children's horizons but to narrow them by attacking both the faith they already have and the family authority that has given it to them." *Id.*

[13] This assumes, of course, that a practical and theoretical distinction can generally be maintained between legitimate discussion and illegitimate coercion, and it assumes that something like viewpoint-neutrality can be maintained in a classroom devoted to discussing viewpoints. Although parts of this Note can be regarded as arguing for the soundness of these general propositions, see *infra* Part II.B.3, and Part II.C.3 n.173, it is simply not the project of this Note to mount a full-blown philosophical defense against those, whoever they may be, inclined to strong skepticism of these possibilities.

What *could* happen within the Critical Discussions course, however—and what seems to be clearly contemplated by some advocates[14]—is that the teacher would lecture by presenting various viewpoints on the day's given (ethical or religious) topic, and then there would be an open critical discussion among students.[15] This discussion could involve arguing in the sense of giving and receiving reasons for this or that opinion. Critical Discussions thus advances a goal of encouraging students to recognize and understand different viewpoints, while eschewing the kind of moral relativism that would treat all ethical disagreement as mere differences in subjective preference or taste beyond any reason or reason-giving.

This Note aims to defend Critical Discussions, and the sorts of dialogic ethics courses it represents, as a constitutional possibility without any need for special religious exemptions from participation. In particular, if Critical Discussions becomes mandatory in the United States, given religious concerns about the curriculum, a constitutional challenge on behalf of religious objectors seems likely. This challenge would likely involve claims of interference with religious exercise and parental rights.[16] Given the strongest form of such a challenge against an ideal instance of Critical Discussions, what ought to be the legal result? In answer, this Note argues that there is no insuperable constitutional barrier to state-mandated Critical Discussions, at least as far as concerns a challenge based on the Free Exercise Clause of the First Amendment[17] and a notion of parental rights.[18]

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[14] *See, e.g.*, LAW, CHILDREN'S MINDS, *supra* note 8, at 166 (proposing that students be presented with "a broad range of different political, moral and religious beliefs and arguments," and also proposing that students "get at least some chance actively to engage in discussion with those from other faiths" and with no religious faith).

[15] For present purposes, I leave open the question of whether, as part of Critical Discussions, the teacher should be allowed to give his *own* opinion. Certainly, if the teacher *was* allowed to give his own opinion during the class discussion, it should be clear to the students that the teacher was an equal participant and not a privileged authority within the discussion. Reasonable minds might perhaps disagree on whether this is actually possible, or whether students will always ascribe to the teacher a position of authority. For my part, I think that it is possible, but the teacher will need to have some sensitivity and conscientiousness to avoid the danger of being seen as a privileged participant.

[16] *Cf.* Kyle Still, Comment, *Smith's Hybrid Rights Doctrine and the Pierce Right: An Unintelligent Design*, 85 N.C. L. REV. 385, 389–90 (2006) (acknowledging the natural fit between free exercise and parental rights claims in a religiously-motivated case objecting to school curriculum).

[17] The First Amendment provides that "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances." U.S. CONST. amend. I. The First Amendment is incorporated against the states through the Fourteenth Amendment.

If this argument is successful, then Critical Discussions is preserved as a policy option for state and local lawmakers, and as a constitutional possibility.

The conclusion argued for here is not obvious. In an article focusing on the constitutionality of a similar hypothetical mandatory curriculum,[19] Tyll van Geel argued that the proposed course could *not* survive a free exercise challenge given a plaintiff with a sincere and felt religious objection.[20] Van Geel alternatively argued that respect for parental rights militated against the ultimate constitutionality of the curriculum.[21] Although not conceived as a point-by-point answer to van Geel, the present Note nevertheless challenges these conclusions directly.

This Note separately considers hypothetical free exercise[22] and parental rights[23] challenges to a mandatory Critical Discussions curriculum. Where the one challenge informs the other, this is noted.

In particular, under the controversial so-called hybrid rights theory, the standard of review applicable to the free exercise challenge would be heightened given a separate parental rights challenge.[24] Assuming the application of this heightened free exercise standard, this Note considers the religious plaintiff's problem of demonstrating a free exercise substantial burden.[25] After rejecting various alternatives for conceptualizing 'substantial burden' (in part, for failing to provide an adequate normative account of the involved principles),[26] this Note argues for the view that a "substantial" burden should be principally identified with a particular clash between some state-required action and a conscientiously-endorsed principle of the religious plaintiff.[27]

Cantwell v. Connecticut, 310 U.S. 296, 303 (1940) ("The fundamental concept of liberty embodied in [the Fourteenth] Amendment embraces the liberties guaranteed by the First Amendment.").

[18] *See infra* Part III.

[19] Van Geel argued against a proposal by Eamonn Callan. *See generally* EAMONN CALLAN, CREATING CITIZENS: POLITICAL EDUCATION AND LIBERAL DEMOCRACY 209–17 (1997) (detailing a plan to create autonomous and reflective democratic-minded citizens by, among other things, requiring students to engage in dialogic "ethical confrontation"). For van Geel's (helpful) summary of Callan's program, *see* Tyll van Geel, *Citizenship Education and the Free Exercise of Religion,* 34 AKRON L. REV. 293, 335–42 (2000).

[20] Van Geel, supra note 19, at 367–81.

[21] *Id.* at 381.

[22] *See infra* Part II.

[23] *See infra* Part III.

[24] *See infra* Part II.A.2.

[25] *See infra* Part II.B.

[26] *See infra* Part II.B.1–4.

[27] *See infra* Part II.B.5.

Supposing that Critical Discussions could substantially burden a religious plaintiff, this Note argues that the state's interest in Critical Discussions nevertheless constitutes a compelling interest sufficient for constitutionality under the heightened standard.[28] This is especially so since the "compelling interest" standard in this context represents a weak test, despite its own label.[29]

By its nature, balancing the state and religious interests against each other requires accounting for the state's policy interests. The demand to provide such an account constitutes a *legal* demand because broad policy considerations do, in a constitutional balancing test, amount to legal considerations. Consequently, this Note focuses primarily on the relevant social goals of Critical Discussions, and argues for the state's interests in advancing these goals.[30] This Note defends the claim that the given account of the state's social interests is broadly consistent with existing legal precedent.[31] Additionally, it is argued that Critical Discussions represents an attempt to foster a particular and special set of skills I have termed "skills of open discourse." In articulating the nature of the state's interest in developing these skills of open discourse it is argued that: (1) there are such skills;[32] (2) such skills are in some relevant sense unnatural and require practice of precisely the kind provided by a non-authoritarian dialogic religion and ethics curriculum (i.e., Critical Discussions);[33] (3) there is a genuine public need for the maximal distribution of these kinds of skills, although it is easy to miss this need given our comfort with a status quo in which *bad* habits of discourse are typical;[34] and, (4) children have an independent interest in developing skills of open discourse that the state properly protects even against religious concerns.[35]

The political nature of these particular arguments cannot be avoided, and it would be disingenuous to pretend that there is any advance strict legal necessity to their conclusions. Nevertheless, given a balancing test in which policy interests count, these arguments matter in constitutionally assessing the existence of a state's interest in Critical Discussions; hopefully, they will establish that the state indeed could have a serious and compelling interest in mandating a course like Critical Discussions. Balancing tests inevitably

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[28] *See infra* Part II.C.

[29] *See infra* Part II.C.

[30] *See infra* Part II.C.1–3.

[31] *See infra* Part II.C. This discussion focuses primarily on *Wisconsin v. Yoder*, 406 U.S. 205 (1972).

[32] *See infra* Part II.C.1.

[33] *See infra* Part II.C.1

[34] *See infra* Part II.C.2.

[35] *See infra* Part II.C.3.

involve broad policy considerations, and regarded in this light, there really is nothing to do but to offer such considerations in their own perhaps not-strictly-legal terms.

After discussing the free exercise challenge, this Note considers a hypothetical parental rights claim against Critical Discussions. Somewhat counterintuitively, "fundamental" parental rights are subject to rational basis review.[36] But rather than offer a separate analysis of state policy under this standard—a review anyway subsumed by the compelling interest analysis offered in the free exercise section—this Note instead considers whether a constitutional conception of parental rights includes a parental power to veto particular state curriculum mandates in the first place.[37] This question cannot be settled by vague Supreme Court pronouncements that parents have the right to "direct the upbringing"[38] of their children. For both legal and independent normative reasons, such a pronouncement ought to be taken in a less-than-absolute sense. This Note argues that constitutionally protected parental rights generally do not include veto power over state curricular mandates.[39]

II. THE FREE EXERCISE CHALLENGE

A. *The History of Free Exercise and the Applicable Legal Standard of Review*

1. *A Short History of the Free Exercise Clause*

Interpretations of the Free Exercise Clause tend to reflect one of two opposed broad conceptions of the proper relationship between state and religion. The accomodationist conception holds that there is a strong presumption in favor of allowing religious exemptions from generally applicable laws.[40] On this view, any presumption-defeating governmental interest would have to be a strong one (certainly stronger than the minimal level of interest required to satisfy 'rational basis' review). By contrast, the neutral law approach denies the existence of any presumption favoring

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[36] *See infra* Part III.A.

[37] *See infra* Part III.B.

[38] Pierce v. Soc'y of Sisters of the Holy Names of Jesus & Mary, 268 U.S. 510, 534 (1925).

[39] *See infra* Part III.B.

[40] *See, e.g.*, MARTHA C. NUSSBAUM, LIBERTY OF CONSCIENCE: IN DEFENSE OF AMERICA'S TRADITION OF RELIGIOUS EQUALITY 164 (2008) (arguing for accommodation as the only way to relieve "special, unequal burdens" placed on minority religions by majority rules).

religious exemptions from neutral laws.[41] Neither the accomodationist nor the neutral law views represent all-or-nothing propositions with respect to the subordination or non-subordination of the religious person to the state, but each view shades the default presumption very differently.[42] The neutral law approach, for example, could allow that, where a law has the purpose of regulating religious or religiously-motivated practice, such a law is constitutionally suspect.[43]

The Supreme Court has historically vacillated between these two views of free exercise, a fact that prevents either interpretive camp from legitimately claiming the moral superiority of pedigree (whatever such moral superiority might ultimately be worth). In its earliest free exercise case confronting a conflict between religious doctrine and state policy in *Reynolds v. United States*,[44] the Supreme Court rejected accommodation.[45] There, the Court upheld an anti-polygamy law operating against Mormons who practiced polygamy as a matter of religious doctrine.[46] The *Reynolds* Court

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[41] The label "neutral law" is adopted from *Employment Division*'s rule: "[T]he right of free exercise does not relieve an individual of the obligation to comply with a 'valid and neutral law of general applicability on the ground that the law proscribes (or prescribes) conduct that his religion prescribes (or proscribes).'" (citations omitted). Employment Div. v. Smith, 494 U.S. 872, 879 (1990).

[42] In distinguishing between accomodationist and neutral law viewpoints, I do not mean to capture every conceivable theoretical possibility, but rather to identify the two competing interpretive poles for which every serious view eventually needs to account. These interpretive poles have been noticed by others. *See, e.g.*, Michael W. McConnell, *Justice Brennan's Accommodating Approach Towards Religion*, 95 CAL. L. REV. 2187, 2188 (2007) (contrasting the approaches of *Employment Division* and *Sherbert v. Verner* as indicative of a deeper philosophical divide). Some theorists aim for (or at least seem to have) positions between these two camps. *E.g.*, Christopher L. Eisgruber & Lawrence G. Sager, *The Vulnerability of Conscience: The Constitutional Basis for Protecting Religious Conduct*, 61 U. CHI. L. REV. 1245, 1290 (1994) [hereinafter Eisgruber & Sager, *Vulnerability of Conscience*] (advancing an "equal regard" theory for adjudicating free exercise cases, a view that turns out to be indecisive with regard to *Employment Division*).

[43] *See* Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah, 508 U.S. 520, 532 (1993) ("we have often stated the principle that the First Amendment forbids an official purpose to disapprove of a particular religion or of religion in general"); *Employment Div.*, 494 U.S. at 877–78 (1990) (listing ways in which the Free Exercise Clause limits government action). In *Employment Division*, the Court, in an opinion by Justice Scalia, adopted the neutral law approach and refused any religious accommodation. *See infra* this Part. But this did not afterwards stop the Court from accommodating religious interest in invalidating the law at question in *Church of the Lukumi Babalu Aye* (a disposition with which Scalia agreed).

[44] Reynolds v. United States, 98 U.S. 145 (1878).

[45] *Id.* at 166.

[46] *Id.* at 168.

distinguished conduct from belief, and held that there was little in the Free Exercise Clause to stand in the way of the regulation of conduct.[47]

By 1940, however, the Court suggested a shifting orientation towards accommodation. In *Cantwell v. Connecticut*,[48] the Court wielded the Free Exercise Clause to strike down Connecticut laws governing religious solicitations for failing to be "narrowly drawn" when that law resulted in the conviction of religious proselytizers.[49] The Court suggested the need to balance between the state's interest in "peace, good order and comfort of the community"[50] against the "interest of the United States that the free exercise of religion be not prohibited and that the freedom to communicate information and opinion be not abridged."[51] *Cantwell*, however, is perhaps inconclusive as a clear statement of free exercise principle, since the *Cantwell* Court treated First Amendment speech interests along with the free exercise interests.[52]

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[47] *Id.* at 164. *Reynolds* nominally professed a concern that the regulated conduct entailed a "violation of social duties or subvers[ion] of good order." Martha Nussbaum—herself clearly in the accomodationist camp—disputes that *Reynolds*'s emphasis on "violation of social duties or subervs[ion] of good order" actually possessed real analytical relevance in the decision. Nussbaum points out that Chief Justice Waite in *Reynolds* does not really apply the professed 'peace and safety' standard, but that it is instead enough for him (and the Court) in upholding the conviction that a law exists criminally sanctioning polygamy. NUSSBAUM, *supra* note 40, at 194–95. Obviously, if "peace and safety" is defined in relation to the very law under challenge, then the "peace and safety" standard is vacuous; the only relevant point is that the religiously-motivated conduct violates the law. Given *Reynolds*'s complete deference to the legislative determination of 'peace and safety,' any temptation to read *Reynolds* as compatible with an accomodationist position—as would be the case if *Reynolds actually* burdened the state to demonstrate a "peace and safety" interest—should be rejected.

[48] 310 U.S. 296 (1940).

[49] *Id.* at 311.

[50] *Id.* at 304.

[51] *Id.* at 307. A fuller quote of the passage:

> The fundamental law declares the interest of the United States that the free exercise of religion be not prohibited and that freedom to communicate information and opinion be not abridged. The state of Connecticut has an obvious interest in the preservation and protection of peace and good order within her borders. We must determine whether the alleged protection of the State's interest, means to which end would, in the absence of limitation by the federal Constitution, lie wholly within the State's discretion, has been pressed, in this instance, to a point where it has come into fatal collision with the overriding interest protected by the federal compact.

[52] *Id.* (emphasizing in the same breath with "free exercise" the policy that "freedom to communicate information and opinion be not abridged."); *see also id.* at 300 (characterizing plaintiff's argument as one concerned both with "freedom of speech" and "free exercise of religion"). Had the speech in *Cantwell* not been religious speech, it is unclear that the Court would have ruled any differently with respect to the Connecticut

A clearer rejection of the earlier *Reynolds* approach came in 1963 with *Sherbert v. Verner*.[53] There, the Court rejected South Carolina's denial of unemployment benefits to Adell Sherbert under its unemployment scheme.[54] Ms. Sherbert lost her job and had difficulty finding another when she refused, on religious grounds, to work on Saturdays.[55] The Court articulated a two-prong test for the resolution of Ms. Sherbert's free exercise claim.[56] First, the Court assessed whether Ms. Sherbert was religiously burdened by the state; and, second, given such a burden, the Court assessed whether there existed a justificatory "compelling state interest."[57] Failing to find such an interest, the Court held the South Carolina law to be unconstitutional in denying Ms. Sherbert's unemployment benefits.[58]

Theoretically, at least,[59] *Sherbert* shifted the presumption in favor of religious accommodation and its test became the standard for resolving free

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law. This, obviously, makes it difficult to identify the free exercise concern as the determining factor.

[53] 374 U.S. 398, 403 (1963). The *Sherbert* Court distinguished *Reynolds* on the ground that, in *Reynolds*, the regulated conduct "posed some substantial threat to public safety, peace or order." *Id.* But this distinction is empty since *Reynolds*'s emphasis on "peace and good order" was analytically irrelevant dicta anyway. *See supra* note 47.

[54] *Sherbert*, 374 U.S. at 402.

[55] *Id.* at 399.

[56] *Id.* at 403. These two prongs are, for example, implicit in the following statement:

> If, therefore, the decision of the South Carolina Supreme Court is to withstand appellant's constitutional challenge, it must be either because her disqualification as a beneficiary represents no infringement by the State of her constitutional rights of free exercise, or because any incidental burden on the free exercise of appellant's religion may be justified by a 'compelling state interest in the regulation of a subject within the State's constitutional power to regulate.'

Id.

[57] *Id.*

[58] *Id.* at 406–07.

[59] There is some dispute over the difference that *Sherbert* actually made in the decision of later free exercise cases. On the one hand, there are those who emphasize the losing record of religious parties before the Supreme Court after *Sherbert*—a record that they contend does not make sense if *Sherbert's* accomodationist stance is taken at face value. *See, e.g.*, Christopher L. Eisgruber & Lawrence G. Sager, *Congressional Power and Religious Liberty After* City of Boerne v. Flores, 1997 SUP. CT. REV. 79, 79–80 [hereinafter Eisgruber & Sager, *Congressional Power*]:

> *Sherbert*'s fierce invocation of the compelling state interest test was never reflected in practice: in only four cases after *Sherbert* did the Supreme Court find that religious believers were entitled to exemptions, and three of those were minor variations on *Sherbert* itself—they were cases in which states denied unemployment insurance benefits after ruling that claimants who left jobs for religious reasons lacked "good cause" for their resignation.

exercise challenges for the next three decades.[60] Notably, the two-prong *Sherbert* test was implicitly adopted in *Wisconsin v. Yoder*.[61] In *Yoder*, the Court rejected the application of Wisconsin's compulsory school attendance law to Amish youth given an objection on religious grounds.[62] *Yoder* marked the only time outside the unemployment-benefits context that the Supreme Court carved out a religious exception to a neutral law.[63]

The accomodationist *Sherbert-Yoder* approach was rejected in *Employment Division v. Smith*.[64] In *Smith*, the Court refused to carve out a religious exception from a "generally applicable"[65] Oregon law criminalizing all peyote use, including sacramental use.[66] *Employment Division* favorably cited the anti-accomodationist *Reynolds*,[67] and generally announced approval of the neutral law approach.[68] In breaking with the accomodationist ethos of *Sherbert* and *Yoder*, *Employment Division* has been the subject of a vast amount of academic criticism.[69] *Employment Division* struck a popular nerve

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By contrast, for example, Martha Nussbaum acknowledges this losing Supreme Court record but points to evidence that, in lower courts, *Sherbert* translated into meaningful accommodation much of the time for the religious plaintiff. NUSSBAUM, *supra* note 40, at 146. *See generally* Amy Adamczyk, John Wybraniec & Roger Finke, *Religious Regulation and the Courts: Documenting the Effects of* Smith *and RFRA*, 46 J. OF CHURCH & STATE 237 (2004) (studying and quantifying the effects of these free exercise decisions and law).

[60] *Sherbert*'s test was rejected in *Employment Division v. Smith*, 494 U.S. 872, 885 (1990).

[61] 406 U.S. 205, 221 (1972). *Yoder* is discussed *infra* Part II.B.4, Part II.C.

[62] *Yoder*, 406 U.S. at 234.

[63] Eisgruber & Sager, *Congressional Power*, *supra* note 59, at 79–80; NUSSBAUM, *supra* note 40, at 140.

[64] *Employment Div.*, 494 U.S. at 884–85.

[65] *Id.* at 884.

[66] *Id.* at 884–85.

[67] *Id.* at 879.

[68] *Id.*: "[T]he right of free exercise does not relieve an individual of the obligation to comply with a 'valid and neutral law of general applicability on the ground that the law proscribes (or prescribes) conduct that his religion prescribes (or proscribes).'" (citations omitted).

[69] *See* John Gatliff, City of Boerne v. Flores *Wrecks RFRA: Searching for Nuggets Among the Rubble*, 23 AM. INDIAN L. REV. 285, 295 n.61 (1998/1999) (collecting sources). Gatliff quotes Ira Lupu's summary of the state of affairs (offered just three years after *Smith*): "[C]riticizing *Smith* is no longer original or useful; we have all become repetitive in our criticisms, and by now, our audiences are either persuaded or turned off." Ira C. Lupu, Employment Division v. Smith *and the Decline of Supreme Court Centrism*, 1993 BYU L. REV. 259, 268.

as well; Congress, acting within months, vainly attempted to reverse the decision legislatively.[70]

Unfortunately for the interest of jurisprudential clarity, *Employment Division* did not make a completely clean break from *Sherbert* and *Yoder*. *Sherbert* and *Yoder* were distinguished, not overruled.[71] Referring to these cases and writing for the Court, Justice Scalia declared that:

The only decisions in which we have held that the First Amendment bars application of a neutral, generally applicable law to religiously motivated action have involved not the Free Exercise Clause alone, but the Free Exercise Clause in conjunction with other constitutional protections, such as freedom of speech and of the press.[72]

This declaration has suggested to some that something of the old *Sherbert* and *Yoder* principles still survive, and, in particular, that a higher standard of review applies to so-called "hybrid" cases (those cases in which the free exercise right is asserted in conjunction with some other right).[73] On this "hybrid rights" theory, pure free exercise claims are subject only to a very minimal review (reflective of *Employment Division*), but if plaintiffs can combine the free exercise claim with another claimed right, then the level of scrutiny is increased to reflect the *Sherbert-Yoder* two-prong test.

2. *Which Standard of Review Applies to a Critical Discussions Challenge?*

Determining the legitimacy of the hybrid rights theory could be key to resolving any free exercise challenge to Critical Discussions. If the hybrid rights theory is false, then any such challenge is all but doomed. Given *Employment Division*'s refusal to allow special religious exemptions to "generally applicable" law, plaintiffs seeking an exception from participation in Critical Discussions would be in a difficult position. Whatever other rights or claims could be raised, the Court would scrutinize such objections under the anti-accommodation neutral law approach. Mandated pursuant to a generally applicable law enacted without the purpose of discriminating against any particular religion, Critical Discussions would clearly be constitutional under this standard.

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[70] Religious Freedom Restoration Act (RFRA), 42 U.S.C. § 2000bb (1993). The constitutionality of the RFRA was rejected (at least as regarded its application to non-federal law) in *City of Boerne v. Flores*, 521 U.S. 507, 511 (1997).

[71] *Employment Div.*, 494 U.S. at 876 (distinguishing *Sherbert*); *id.* at 881 (distinguishing *Yoder*).

[72] *Id.* at 881 (citations omitted).

[73] *See, e.g.*, van Geel, *supra* note 19, at 304 n.40.

Unfortunately, it is not clear what should be made of the hybrid rights theory. The hybrid rights theory has split the Circuit Courts of Appeals, and the Supreme Court has yet to resolve this split.[74] Rather than attempt to resolve this contentious issue here,[75] this Note will simply assume *in arguendo* that the hybrid rights theory is true. On this assumption, if some other non-free exercise right can be raised, the level of scrutiny applicable to the free exercise claim will reflect the heightened *Sherbert-Yoder* standard.[76] Perhaps the most obvious other right in the present hypothetical is a parental right to direct their children's upbringing.[77] This Note thus assumes that such a parental right is asserted in addition to the free exercise claim.

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[74] The Circuits disfavoring the "hybrid rights" theory are the Second, Third, and Sixth Circuits. Leebaert v. Harrington, 332 F.3d 134, 143 (2d Cir. 2003) ("*Smith*'s 'language relating to hybrid claims is dicta and not binding on this court.'") (citations omitted); Combs v. Homer-Center Sch. Dist., 540 F.3d 231, 247 (3d Cir. 2008) ("Until the Supreme Court provides direction, we believe the hybrid-rights theory to be dicta."); Kissinger v. Bd. of Trs. of Ohio State Univ., Coll. of Veterinary Med., 5 F.3d 177, 180 (6th Cir. 1993) ("We do not see how a state regulation would violate the Free Exercise Clause if it implicates other constitutional rights but would not violate the free Exercise Clause if it did not implicate other constitutional rights."). The Circuits apparently taking a more favorable view of the hybrid rights theory include the First, Ninth, Tenth, and D.C. Circuits. EEOC v. Catholic Univ. of Am., 83 F.3d 455, 467 (D.C. Cir. 1996) (holding that the combination of Establishment Clause and Free Exercise Clause claims warranted heightened scrutiny under *Smith*); Brown v. Hot, Sexy & Safer Prods., Inc., 68 F.3d 525, 539 (1st Cir. 1995) (implicitly accepting the hybrid rights theory but refusing to apply it); Axson-Flynn v. Johnson, 356 F.3d 1277, 1295 (10th Cir. 2004) (accepting the hybrid rights theory); San Jose Christian Coll. v. City of Morgan Hill, 360 F.3d 1024, 1031 (9th Cir. 2004) ("In such 'hybrid' cases, the law or action must survive strict scrutiny."). Among the Circuits favoring the hybrid rights theory, there is a further split over the question of whether or not the additional claimed right must ultimately be vindicated to secure heightened state scrutiny with regard to the free exercise claim. *Compare* Henderson v. Kennedy, 253 F.3d 12, 19 (D.C. Cir. 2001) (refusing to apply heightened scrutiny where the additional claim lacked independent viability), *and Hot, Sexy & Safer Prods.*, 68 F.3d at 539 (same), *with Axson-Flynn*, 356 F.3d at 1295 (suggesting that the additional claim does not have to be ultimately vindicated, although there must be a "fair probability or a likelihood" of success), *and San Jose Christian Coll.*, 360 F.3d at 1032 (the additional claim must be "colorable").

[75] *See, e.g.*, Frederick Mark Gedicks, *Three Questions About Hybrid Rights and Religious Groups*, 117 YALE L.J. POCKET PART 192 (2008), http://thepocketpart.org/2008/03/24/gedicks.htmlyalelawjournal.org/content/view/651/14; Still, *supra* note 16, at 391.

[76] *See infra* Part II.C. It should be apparent that assuming the truth of the hybrid rights theory serves to "raise the bar" for the present Note by presenting an obstacle to be overcome. The "obstacle," of course, is the *Sherbert* presumption in favor of allowing religious exceptions to general laws where those laws burden the religious person (*qua* religious person). *See supra* Part II.A.1.

[77] *See infra* Part III.

B. *Locating the Substantial Burden*

A free exercise challenge under the *Sherbert-Yoder* framework requires the plaintiff to demonstrate a "substantial burden" on his religious exercise.[78] But how should this substantial burden be principally identified? In answer, this section argues that it is not enough for substantial burden that a student would experience psychological discomfort, or that a student would be exposed to ideas he finds offensive, or that a student's religious belief may shift as a result of the curriculum, or even that a student may emerge from the Critical Discussions course with a wholly altered religious or ethical identity. Instead, substantial burden ought to be principally identified with a particular clash between the student's own conscientiously self-endorsed values and some particular contrary requirement of the curriculum.

1. *Psychological Discomfort/Mere Offensiveness*

The hypothetical Critical Discussions curriculum encourages students to reflect on their own deepest value commitments and to confront viewpoints which are not their own in a serious way. Critical Discussions represents, in other words, a dose of anti-dogmatism about values and ethics, and encourages ethical reasoning skills. Among proponents, these features are thought to be virtues.[79] But for students unused to the kind of reflection and dialogue envisioned by Critical Discussions, and perhaps particularly for those for whom ethics is experienced as a simple authoritarian matter, such reflection and dialogue could be uncomfortable and perhaps even psychologically disturbing (and no matter how ideal the teacher-moderator).[80]

Proponents of Critical Discussions-like coursework should thus fully grant the reality of the inner turmoil that serious discussion of ethics and

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[78] The precise phrase "substantial burden" appears nowhere in either *Sherbert* or *Yoder*. Nevertheless, the pre-*Employment Division* standard is traditionally understood in these terms. *See, e.g.*, *Employment Div.*, 494 U.S. at 894 (O'Connor, J., concurring) (citing *Sherbert* as standing for a test incorporating a prong of "substantial burden"); van Geel, *supra* note 19, at 353 n.240 (noting that a lesser standard would likely prove judicially unworkable).

[79] *See, e.g.*, LAW, CHILDREN'S MINDS, *supra* note 8, at 1–3, 164–65.

[80] *Cf.* van Geel, *supra* note 19, at 367 (concluding that participation in a program similar to that considered here would induce distress or discomfort in an objecting religious student). This conclusion should not be controversial since this result is acknowledged by the proponent (Eamonn Callan) of the particular program van Geel considers. *Id.* at 342. Advocating dialogue about values in schools, Callan acknowledges that "moral distress is an inevitable consequence of real moral dialogue under pluralism . . ." CALLAN, *supra* note 19, at 202.

religion can sometimes induce, and that a program like Critical Discussions would be likely to induce in some cases. Such psychological discomfort, however, does not itself rise to the level of a substantial burden on religious free exercise, even if the cause of the discomfort is to some degree religious.[81] In *Lee v. Weisman*,[82] the Court rejected the constitutionality of prayer at a public school's graduation ceremony,[83] but emphasized that its holding was not contingent on the existence of offensiveness as such: "We do not hold that every state action implicating religion is invalid if one or a few citizens find it offensive."[84] The scope of legitimate religious interests does not properly include a right to be always psychologically comfortable.[85]

One reason for this rule is that, most basically, a purely psychological account of what it is to be "substantially burdened" as a religious person misses something in those paradigm cases where we may be bothered by a failure of religious accommodation. For example, in *People v. Phillips*,[86] an early state case, a Catholic priest found himself in the vise of dilemma: either break the confessional sacrament, which his conscience forbade him to do as a matter of religious principle, or refuse to testify in court as ordered, and potentially face legal sanction.[87] Whatever one may think about the ultimate wisdom of allowing the priest not to testify (and then, as now, the point generated argument on both sides),[88] the unmistakable burden created by the law on the conscience of the priest should not be denied. For the priest, there were deep principles at stake.[89] Even if we imagine that the priest

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[81] Van Geel, *supra* note 19, at 354 n.243. Van Geel points to *Lee v. Weisman*, an Establishment Clause case, as articulating the relevant principle. *Id. Lee v. Weisman* states that "people may take offense at all manner of religious as well as nonreligious messages, but offense alone does not in every case show a violation." 505 U.S. 577, 597 (1992).

[82] 505 U.S. 577 (1992).

[83] *Id.*

[84] *Id.* at 597.

[85] *Id. But cf.* George W. Dent, Jr., *Of God and Caesar: The Free Exercise Rights of Public School Students*, 43 CASE W. RES. L. REV. 707, 728–29 (1993) (arguing that offensiveness deserves a heightened analytical role). Van Geel discusses Dent briefly. Van Geel, *supra* note 19, at 354 n.243.

[86] Court of General Sessions, City of New York (June 14, 1813); 1 CATH. LAW. 199 (1995). *See generally* NUSSBAUM, *supra* note 40, at 126–29 (discussing the case).

[87] NUSSBAUM, *supra* note 40, at 126–27.

[88] *See, e.g.*, City of Boerne v. Flores, 521 U.S. 507, 543 (1997) (Scalia, J., concurring) (same); *id.* at 127–30 (acknowledging the existence of some debate on the issue).

[89] *See* NUSSBAUM, *supra* note 40, at 128.

experienced some psychological discomfort,[90] it was his own *principles being at stake* that reveals itself as the more basic concern.[91] In other words, it cheapens real religious interests to equate them in general merely with the commonplace desire for psychological equilibrium and freedom from emotional upset.

Rather, insofar as the constitutional protection of religious interests tracks some sensible value, that value is the value of integrity of conscience, perhaps as part of a search for meaning in life.[92] *This* sort of value, incidental to a respect for persons as ends,[93] is hard to deny, and is also not readily equatable with mere psychological comfort. It is a concern for the integrity of conscience as such that makes sense of any feeling for Father Kohlman's dilemma. Indeed, for some, the right kind of religious being may involve a kind of striving, suffering, or psychological *dis*comfort.[94] Psychological discomfort or mere offensiveness cannot be the *sine qua non* of "substantial burden."

2. *Coercion and Exposure*

If offensiveness or psychological discomfort as such does not constitute a "substantial burden" on free exercise, the same cannot be said for coercion, including "subtle coercive pressure."[95] The Supreme Court is clear that where there is state-directed coercion against particular religious beliefs, that religious belief is burdened.[96]

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[90] Interestingly enough, it is not clear that Father Kohlmann, the priest in *Phillips*, lacked any inner peace of mind at all. Father Kohlmann had resolved to refuse to testify whatever the consequence. *Id.* at 127 (quoting Kohlmann's testimony).

[91] It was concern for the priest's principles being at stake that motivated the accommodation in that case. *Id.* at 128 (quoting the court's opinion).

[92] *See id.* at 168; *cf.* Lee v. Weisman, 505 U.S. 577, 591 (1992) ("The Free Exercise Clause embraces a freedom of conscience and worship . . . .").

[93] *Cf.* NUSSBAUM, *supra* note 40, at 56–57 (discussing philosophical connections between Immanuel Kant and Roger Williams in understanding respect for the conscience).

[94] Themes of striving are common enough in religious texts. *See, e.g.*, *Genesis* 32:23–34 (describing Jacob wrestling with God). One could imagine a religion that held the attainment of psychological equilibrium to be a supreme good. But the very fact that we would initially be inclined to respect equally both the pro-psychological-comfort religion and the anti-psychological-comfort religion speaks to the fact that it is not psychological comfort *as such* that is being valued by us, but something else—most plausibly, the very striving of the conscience that in the one case demands psychological comfort, and in the other, does not.

[95] *Weisman*, 505 U.S. at 592.

[96] *Id.* at 587 ("It is beyond dispute that, at a minimum, the Constitution guarantees that government may not coerce anyone to support or participate in religion or its

In identifying the constitutionally relevant sense of 'coercion' in light of a challenge to school curriculum, the Sixth Circuit in *Mozert v. Hawkins* proposed to distinguish 'coercion' to believe something from 'exposure' to (objectionable) ideas.[97] With this distinction in hand, the Sixth Circuit held that the objecting religious students were merely innocently exposed, not problematically coerced, when required to read from and discuss textbooks to which they objected on religious grounds.[98] The pre-*Employment Division* court interpreted the students' interaction with the curriculum as "exposure without compulsion."[99] On this basis, the court held that there was no substantial burden on the religious free exercise of the plaintiffs[100] and upheld the mandatory curriculum over the objections.[101]

Without expressly addressing the exposure/coercion distinction itself, van Geel nevertheless rejects *Mozert*'s conception of "coercion" given the Supreme Court's later and greater sensitivity to "subtle coercive pressure"[102] in *Lee v. Weisman*.[103] On this telling, *Mozert* understands the meaning of "coercion" anachronistically.[104] It is implicitly van Geel's sense that, decided today and properly sensitive to "subtle coercive pressure," *Mozert*'s result ought to be different.[105]

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exercise . . . ."). *Weisman* was primarily an Establishment Clause case, but it makes sense to treat its concern to avoid coercion as applicable to the free exercise arena. *See* van Geel, *supra* note 19, at 355–56. Certainly, cases dealing with free exercise have taken "coercion" to be an analytically relevant concept. *See, e.g.*, Mozert v. Hawkins County Bd. of Educ., 827 F.2d 1058, 1066 (6th Cir. 1987).

[97] *See Mozert*, 827 F.2d at 1063–64 (not using the word 'coercion' but expressing the idea of an opposition between this concept and 'exposure'); *id.* at 1067 (holding out the possibility of a distinction between "exposure" and "coercion" in those terms).

[98] *See id.* at 1063–64, 1067.

[99] *Id.* at 1067 (characterizing *Wisconsin v. Yoder* as allowing room for the possibility of "exposure without compulsion").

[100] *Id.* at 1063 (opening Part III of the decision with the declaration that the "first question" is "whether a governmental requirement that a person be exposed to ideas he or she finds objectionable on religious grounds constitutes a burden on . . . free exercise"), *and id.* at 1068 (concluding the same section after lengthy analysis by stating that "governmental actions that merely offend or cast doubt on religious beliefs do not on that account violate free exercise.").

[101] *Mozert*, 827 F.2d at 1070.

[102] Lee v. Weisman, 505 U.S. 577, 592 (1992).

[103] Van Geel, *supra* note 19, at 359.

[104] *See id.* (van Geel says "rather traditional").

[105] *See id.* at 358–59. Taking up a hypothetical challenge to a similar curriculum proposal, van Geel takes it to be obvious that certain (coercive?) factors would "especially reinforce" the conclusion that a substantial burden was being imposed on a religious objector, including that "students are at least a quasi-captive audience, face authority figures, and peer pressure." *Id.* at 367.

Perhaps van Geel correctly claims that *Weisman* has, relative to *Mozert*, a heightened sensitivity to the possibility of "subtle coercive pressure."[106] Such a heightened sensitivity would seem to be a good thing, as far as it goes; undoubtedly, coercion *can* threaten integrity of conscience,[107] and we should first prefer *no* such threat, as opposed to a *small* such threat.

Nevertheless, despite van Geel, the two cases can be read consistently such that the evolved understanding of coercion evident in *Weisman*[108] does not necessarily overrule *Mozert* or its key 'exposure' versus 'compulsion' (or coercion) distinction.[109] In part, this is because it only half-describes things to say that some situation involves "coercive pressure," whether subtle or not. Critically, the object of the coercive pressure needs to be specified—"coercive pressure" *to do what*, exactly? In *Weisman,* the coercive pressure applied to cause the student to do something intrinsically objectionable: namely, objectively signaling assent to a proposition not actually believed.[110] What mattered to the *Weisman* Court was that the "subtle and indirect" pressure aimed to cause the student to behave *as if* she believed something (or held values) she actually did not:

> [F]or the dissenter of high school age, who has a reasonable perception that she is being forced by the State to pray in a manner her conscience will not allow, the injury is . . . real . . . . *What matters is that, given our social conventions, a reasonable dissenter in this milieu could believe that the group exercise signified her own participation or approval of it.*[111]

Any fair discussion of the First Amendment meaning of "subtle coercive pressure" in *Weisman* should account for the fact that that the pressure in *Weisman* was aimed at causing action which *in itself* violated the conscience of the student.

Consistently with *Weisman*, *Mozert* similarly inquired about the object of the supposed official pressure, and, in particular, whether students would do something that would signal approval of propositions or values contrary to their consciences.[112] The *Mozert* court thought it "abundantly clear" that students would not be required to do anything in light of the curriculum that violated their conscience: "It is abundantly clear that the exposure to

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[106] *Id.*

[107] *See infra* Part II.B.3.

[108] Arguably, however, the *Weisman* Court understood itself to be applying a pedigreed, as opposed to novel, concept of coercion. 505 U.S. at 587, 592.

[109] *Mozert*, 827 F.2d at 1067.

[110] *Weisman*, 505 U.S. at 593.

[111] *Id.* (emphasis added).

[112] *Mozert*, 827 F.2d at 1066.

materials in the Holt series did not compel the plaintiffs to 'declare a belief,' 'communicate by word and sign [their] acceptance' of the ideas presented, or make an 'affirmation of a belief and an attitude of mind.'"[113] What bears emphasis in this declaration is not that the word "compel" is used instead of the more-evolved phrase "subtly coerce,"[114] but that the court thought that the object of official pressure in any case was *not* any action objectively signaling approval of propositions or values contrary to the conscience of the concerned student.

From this viewpoint, *Weisman* and *Mozert* do not disagree on fundamental principle. Rightly or wrongly, the *Mozert* court did not think that the actions undertaken by students in light of the state's practice would signal any kind of acquiescence or endorsement of values or beliefs not held by the student; the *Weisman* Court, by contrast, thought that actions undertaken by that student *would* signal just that sort of acquiescence or endorsement. This difference accounts for the different treatment of the respective plaintiffs, without any need to reject *Mozert*'s exposure-versus-compulsion/coercion analysis.

In short, there is nothing in *Weisman* to suggest any fundamental rejection of *Mozert*'s acceptance of classroom exposure to and discussion of offensive ideas. In fact, *Weisman* suggests in dictum its comfort with such a conception of the space of constitutionally innocent possibilities: "To endure the speech of false ideas or offensive content and then to counter it is part of learning how to live in a pluralistic society, a society which insists upon open discourse towards the end of a tolerant citizenry."[115] The distinction between compulsion (or coercion) and exposure remains to inform a proper understanding of any free exercise substantial burden.

To be perfectly clear, this is not to claim that a First Amendment burden can *only* arise through being forced to look as if you agree with something you do not, as in *Weisman*; burdens may perhaps arise in other ways. It is only to say that, as far as *Weisman* is concerned, it appears that there is no broader problem in generally distinguishing compulsion or coercion from exposure.

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[113] *Id.* The court made clear, as well, that it would decide differently if the case were otherwise: "Proof that an objecting student was *required* to participate beyond reading and discussing assigned materials, or was disciplined for disputing assigned materials, might well implicate the Free Exercise Clause because the element of compulsion would then be present. But this was not the case either as pled or proved." *Id.* at 1064.

[114] *But cf.* van Geel, *supra* note 19, at 359 (quoting a similar excerpt and arguing for the incompatibility with *Weisman*).

[115] *Weisman*, 505 U.S. at 590.

3. *Coercion and Belief Determination*

Some commentators, including van Geel, have alternately suggested that the concern to avoid coercion might track a deeper concern to prevent students' religious beliefs from being re-ordered or re-determined as a result of interaction with a particular curriculum.[116] Thus, for example, van Geel objects to the aim of making a student value autonomy when the student antecedently objects to such a value.[117] This raises a question: is there something about determining the beliefs of a "quasi-captive"[118] student audience that necessarily involves coercion in a relevant, objectionable sense? This section argues 'no,' analyzing the concept of coercion and suggesting that Critical Discussions particularly fails to be coercive in any meaningful sense.

While we can imagine *some* ways of determining belief that would be objectionably coercive, it does not follow that *all* ways of determining belief are improper.[119] After all, nearly *every* classroom aims to reorder students' beliefs by helping them to master novel concepts of one sort or another—and in "quasi-captive" student audiences facing an "authority figure,"[120] no less—yet these features of school life do not ordinarily mark out anything of intrinsic concern. So, reordering-of-belief simpliciter cannot be coercion, at least if "coercion" identifies something concerning (as it surely did to the *Weisman* Court).[121]

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[116] *See* van Geel, *supra* note 19, at 367 (drawing a picture of a scenario in which a religious student's beliefs are challenged and treating this as amounting to an (ipso facto?) substantial burden). Certainly it is plausible to think that, from the viewpoint of the religious plaintiff, a concern to preserve certain beliefs inviolate is indeed the central concern. *See also* Stanley Fish, *Children and the First Amendment*, 29 CONN. L. REV. 883, 887–88 (1997) (discussing the concerns of Vicki Frost, the *Mozert* plaintiff). Reflecting on *Mozert*, Fish rejects the possibility of sensibly distinguishing between exposure and coercion, characterizing the idea of "education without inculcation" as an impossible dream and seemingly adopting as his own the "Vicki Frost objection:" "Exposure is indoctrination and will exercise an improper influence over my children." *Id.* at 889–90. However, one need not accept the "Vicki Frost objection" (and its attendant normative claims) to make some sense of a religious plaintiff's concern to prevent religious beliefs from being reordered or abandoned.

[117] Van Geel, *supra* note 19, at 367.

[118] *Id.*

[119] In general, this point is easily missed by a slanted focus on particular instances of belief-ordering like indoctrination or inducing cognitive dissonance. *See id.* at 358 (discussing cognitive dissonance as an instance of an illegitimate, coercive way in which to order a subject's beliefs).

[120] *Id.* at 367.

[121] *See supra* Part II.B.2.

But if there are some methods of determining belief that are not intrinsically concerning, there may be others that are. Van Geel provides a particular example: cognitive dissonance. [122] "Cognitive dissonance" identifies, or includes under its concept, the psychological state of a person who acts inconsistently with antecedently held beliefs (such as moral beliefs).[123] Belief-shifting resolves this dissonant inner state.[124] In virtue of this phenomenon of "cognitive dissonance," a person can frequently be induced to change his beliefs as a way of alleviating inner psychological tension. [125] Van Geel's sense—shared by this Note—is that there is something inappropriate about inducing "cognitive dissonance" for the purpose of determining someone's beliefs.[126]

A slightly complicated picture emerges from considering these contexts together: there are some cases (math class, perhaps) where determining another's beliefs does not seem meaningfully coercive, and other cases (inducing cognitive dissonance) where there *is* such a concern. Assuming that the Supreme Court can distinguish these cases—and hopefully, the Supreme Court lacks any intellectual obligation to view math class as meaningfully coercive—a theoretical question immediately arises: how, in general, can the one case be distinguished from the other? What gives the difference between appropriate and inappropriate ways of determining belief? These theoretical questions have real consequence in separating legitimate from illegitimate methods of ordering belief such as might be thought meaningfully and unconstitutionally coercive. And it would not do to answer these questions in terms of psychological concepts like peer pressure [127] or cognitive dissonance. [128] These terms, if they have any appropriate jurisprudential authority at all in assessing problems of conscience, derive their authority from the very fact that they capture, in the context of particular cases, instances of illegitimate ways in which to order belief. So these psychological concepts do not *answer* the theoretical question so much as *raise* it: just what is it to be an illegitimate way of ordering belief? How should such a concept be understood?

Fortunately, the general account needed here can be found in a distinction between normative and causal determination, as expounded by the

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[122] Van Geel, *supra* note 19, at 358.

[123] *Id.*

[124] *Id.*

[125] *Id.*

[126] *See id.*

[127] *Id.* at 367.

[128] Van Geel, *supra* note 19, at 357–58.

philosopher Stephen Law.[129] Law points out that rational argument can have the effect of determining our beliefs in a certain way, as can brainwashing and indoctrination.[130] But in the case of rational argument—and not in the case of brainwashing and indoctrination—the determination is normative, not causal.[131] A valid and sound deductive argument, for example, represents a reason to accept the conclusion, and, if the conclusion is novel, to alter our beliefs. It shows you what you "ought to believe if you want to avoid contradiction and give your beliefs the best chance of being true."[132] As Law points out, it misdescribes things to suggest that the rational determination of our beliefs is just another exercise of power or domination, as in the case of brainwashing or indoctrination. [133] Rational determination succeeds in determining beliefs (when it succeeds, anyway) because the determinee is already herself committed to the demands of rationality; brainwashing and indoctrination, by contrast, do not necessarily rely on any such personal commitment to rationality for success in reordering belief.[134]

To whatever extent that Critical Discussions determines beliefs, such determination falls into the normative category. The idea of the Critical Discussions course is that students ought to be able to reason and discuss ethical and religious topics in an analytical way, and that the means by which students are best taught to do this is by themselves modeling such discussion under the guidance of a teacher-moderator with some background of ethical and religious knowledge. In this vision there is perhaps more than an echo of the *Weisman* Court's call for a "society which insists upon open discourse"[135] of a kind that is not merely about inculcating the values of a perceived orthodoxy, except, necessarily, whatever value it is that insists upon open discourse in the first place (although one could imagine a discussion in which even *that* value is analyzed). The kind of determination of belief resulting from the encounters in a Critical Discussions class, if

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[129] Stephen Law, *Religion and Philosophy in Schools*, *in* PHILOSOPHY IN SCHOOLS 41, 53–54 (Michael Hand & Carrie Winstanley eds., 2008) [hereinafter Law, *Religion and Philosophy in Schools*].

[130] *Id.* at 53.

[131] *Id.*

[132] *Id.*

[133] *Id.*

[134] It might be more technically precise to distinguish between *mere* causal and normative belief-determination; clearly, normative or rational belief-determination can have causal force. *Id.* Ultimately, however, the label is not important; what *is* important is the point that there is something (for lack of a better word) *special* about normative determination of belief such that it does not ordinarily concern us. And clearly, normative force can not be understood purely in terms of causal efficacy. *See* Law, *Religion and Philosophy in Schools*, *supra* note 129, at 53.

[135] Lee v. Weisman, 505 U.S. 577, 590 (1992).

any,[136] should be essentially normative determinations of the kind that can result from *any* serious rational discussion and reflection. To label this kind of normative determination as concerningly coercive, however, misses the crucial distinction between normative and causal determination. Only causal determination is worth worrying about.

It is certainly a real possibility that the reflection and dialogue engendered as part of the Critical Discussions curriculum would have the effect of determining the re-ordering of students' ethical or religious beliefs, and potentially in ways uncomfortable to some members of the students' communities and families. Careful reflection and dialogue generally can have such effects, after all. But it is not enough to suggest—or even to demonstrate—simply that a student has reordered (or would reorder) his beliefs as a result of the Critical Discussions curriculum; what matters is that this re-ordering is determined in an illegitimate way. What matters is that the re-ordering is not normatively determined. And there is no reason to suppose out-of-hand that Critical Discussions would non-normatively determine students' beliefs.[137]

As for the special fact that the discussion takes place before an authority figure,[138] this concern (if we really do think that it meaningfully marks out 'coercion') can be mitigated by insisting that the teacher not callously dismiss students' views or dogmatically insist on the adoption of her own views—or any particular view, for that matter. In fact, the insistence could be, and perhaps should be, that the teacher's own views remain a mystery. As for the concern over peer pressure,[139] the rule should be that any non-normative peer pressure is forbidden. Neither does the "quasi-captive"[140] nature of classroom experience mark out anything of special concern. "Quasi-captivity" is simply an unavoidable fact of school life, and not necessarily indicative of coercion in any meaningful sense. Since the requirement of mandatory participation does not mark out anything of concern in any other class, it should not be taken to necessarily do so in the case of Critical Discussions.

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[136] Incidentally, the idea that it is at all *easy* to change a person's mind on big issues with "enough" discussion is almost certainly false, as anyone participating in or witnessing such an encounter could attest.

[137] One could imagine a particular kind of as-applied challenge to Critical Discussion where a teacher abused the curriculum for the sake of proselytizing or badgering students. But since this is not what the curriculum envisions, such special cases can be put aside for the sake of the present discussion.

[138] Van Geel, *supra* note 19, at 367.

[139] *Id.*

[140] *Id.*

4. *Identity-Shifting and* Yoder

In oral arguments before the Supreme Court in *Wisconsin v. Yoder*,[141] Respondent's Counsel urged the Court to be concerned for the maintenance of the identity of Amish youth *as* Amish youth.[142] On one reading of *Yoder*, the Court seems to have accepted this urging, seemingly expressing a concern to prevent the state from having any hand in shifting Amish youths' identity.[143] For the sake of convenience, let this be called the *stable identity principle*, since, on this reading, there is assumed to be some kind of principle under which the state should not pursue policies having the likely effect of altering minority religious identities. In other words, this is the view that the state must in some relevant sense preserve the stable identity of religious groups.

What should be made of the jurisprudential place of this purported stable identity principle, especially if such a principle were taken to guide an analysis of the existence of a religious substantial burden? Hopefully, not too much. One reason to reject the supposed stable identity principle is that there simply is nothing intrinsically wrong or concerning about the shift of identities or allegiances as such. Indeed, the very idea of respecting conscience and conscientious striving suggests the importance of openness to the possibility that some people may shift identities by altering their political, religious, or ethical views.

Second, the stable identity principle problematically assumes that children, in particular, presumptively properly *belong*—and so should remain—in whatever social, intellectual, or religious community they

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[141] Transcript of Oral Argument at 818–20, Wisconsin v. Yoder, 406 U.S. 205 (1972) (No. 70-110).

[142] Audio: Oral Arguments in Wisconsin v. Yoder 41:00–44:45 (Dec. 8, 1971), *available at* http://www.oyez.org/cases/1970-1979/1971/1971_70_110/argument/70-110_19711208-argument.mp3. Respondent's council urged concern for the "alienation" that Amish children would feel if they were forced to confront values and ways of life alien to their communities, stating that "the child's involvement in the high school is going to be destructive of his faith" and "psychologically damaging . . ." *Id.* at 45:15.

[143] *See, e.g.*, 406 U.S. at 235:

> Aided by a history of three centuries as an identifiable religious sect and a long history as a successful and self-sufficient segment of American society, the Amish in this case have convincingly demonstrated the sincerity of their religious beliefs, the interrelationship of belief with their mode of life, the vital role that belief and daily conduct play in the continued survival of Old Order Amish communities and their religious organization, and the hazards presented by the State's enforcement of a statute generally valid as to others.

Such a statement could seem to suggest a concern to preserve the identity of the Amish *as* Amish.

originally happen to find themselves. But why should this be so? Communities can be empowering, but they can also be limiting, and where a community is limiting, children of that community should not be discouraged from transcending such limitations. It is logically possible, at least, that some communities in some respects might deserve less, rather than more, respect.

Third and finally, the state—including the judicial branch—ought to be indifferent and neutral with respect to whether any particular community survives in its present form or not. It is not properly the concern of the judiciary to preserve the identity of minority groups. The judiciary arguably has an interest in preventing discrimination against minority groups,[144] but this interest in fair and equal treatment should not be carelessly equated with a state interest in preserving minority identity as such.[145]

Fortunately, *Yoder* can be read alternatively, not as enshrining a stable identity principle, but as noticing some particular features of Amish belief inconsistent with the particular practices of a secular high school.[146] The Amish oppose a life of the mind more or less as such, and so the practice of intellectual seeking for them is necessarily at odds with the principles of their religious commitment.[147] In accommodating Amish religious belief, then, the Court expressed concern for the presence of a direct conflict between a particular principle of Amish religious belief (doubtless thought to be shared by both the parents and the particular students)[148] and the very practice of secondary education itself.[149]

Consequently, it should not be enough, in demonstrating a "substantial burden" posed by the Critical Discussions course, to show that such a course could or would cause students to shift their identity away from a particular religious community. There is no good advance reason to worry that someone's identity may alter, or to worry about the aggregate effects that

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[144] Eisgruber & Sager, *Vulnerability of Conscience*, *supra* note 42, at 1248.

[145] This view was arguably articulated in *Zorach v. Clauson*, when Justice Douglas, writing for the Court, recognized that religious sects properly relied only on the "appeal of their dogma" to flourish. 343 U.S. 306, 313 (1952) ("We sponsor an attitude on the part of government that shows no partiality to any one group and that lets each flourish according to the zeal of its adherents and the appeal of its dogma.").

[146] *See Yoder*, 406 U.S. at 223.

[147] *Id.* (characterizing the Amish as objecting to "conventional formal education"); *id.* at 218 ("The impact of the compulsory-attendance law on respondents' practice of the Amish religion is not only severe, but inescapable, for the Wisconsin law affirmatively compels them, under threat of criminal sanction, to perform acts undeniably at odds with fundamental tenets of their religious beliefs.").

[148] *See id.* at 230–31; *id.* at 237 (Stewart, J., concurring); *id.* at 241 (Douglas, J., dissenting in part).

[149] *Cf.* NUSSBAUM, *supra* note 40, at 142 (similarly characterizing Amish objections to traditional higher education).

such a movement may have on larger minority communities. This is especially so if any shift is normatively determined, as it would be in the case of Critical Discussions.[150] As the *Weisman* Court suggested, there ought to be some tolerance for the give-and-take of "open discourse."[151]

5. *"Substantial Burden" Requires a Direct and Particular Clash Between a Deeply Held Principle and a State-Mandated (or Incentivized) Activity*

Hopefully, something positive emerges out of the above discussion of what properly does *not* count as a "substantial burden" under the *Sherbert-Yoder* framework: in the curricular context, a substantial burden ought principally to be identified with a particular clash between some deeply held principle and a particular contrary requirement of the curriculum. Obviously, this kind of situation could also involve serious psychological discomfort and a concern (on the part of religious plaintiffs) to maintain a particular identity associated with a religious outlook or community. But these factors are not the gravamen of the free exercise challenge. Instead, the fundamental free exercise interest reflects the value attached to the integrity of a person's conscience, a value traditionally connected to religious concerns, but which perhaps encompasses any kind of serious, principled striving for meaning in life.[152] It is *this* sort of value that is threatened when the state requires a person to take some action that violates their own deeply held principles.

This means that the free exercise challenger of Critical Discussions should demonstrate that a student's own deeply held principles would be violated by some particular aspect of the program. Van Geel suggests, for example, that a religious student may recognize in a course like Critical Discussions an attempt to make her an autonomous person, and the student may think that being an autonomous person is simply wrong.[153] To liberals, this is indeed a disturbing thought because it seems to imply the value of a kind of ignorance and disability (likely enforced through coercion of one sort or another), but there are certainly some fundamentalist religious traditions which value obedience and submission to authority over personal autonomy.

Of course, being an autonomous person consists of far more than actively participating in class discussion on controversial topics. It is not clear that a student who participated in such discussions could not remain non-

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[150] *See supra* Part II.B.3.

[151] Lee v. Weisman, 505 U.S. 577, 590 (1992).

[152] NUSSBAUM, *supra* note 40, at 173 (suggesting that "religion" should be understood to broadly encompass kinds of principled striving not reflecting traditional conceptions of religion).

[153] Van Geel, *supra* note 19, at 367.

autonomous if required by their religion. Certainly, the idea that Critical Discussions would necessarily make student-participants autonomous people seems false. So this particular representation of free exercise substantial burden may not be a strong one.

As an alternate possible religious objection, Nussbaum points out that there are some religious traditions that reject as sinful a practice of imagining oneself in the shoes of another person for the sake of developing ethical reasoning capacities.[154] Given this, an objection to Critical Discussions could perhaps arise because the course explicitly contemplates that students *will* consider ethical dilemmas and exercise precisely this kind of ethical imagination. Perhaps in this way, the course could require some students to sin in their own eyes. If there was this sort of direct conflict, then there could be a free exercise substantial burden.

C. *The State's Compelling Interest*

Faced with a substantial burden, the second compelling interest prong of *Sherbert-Yoder* applies.[155] The *Sherbert-Yoder* version of compelling interest is, however, something of a special creature, "strict in theory but feeble in fact" in its application against the state.[156] The Supreme Court has never failed to find the compelling interest satisfied except in unemployment cases (starting with *Sherbert*) and in *Yoder*.[157] Arguably, it was partially the recognition of this fact as a disconnect between rhetoric and application which motivated the rejection of the *Sherbert-Yoder* framework in *Employment Division*.[158]

Given the actual feebleness of the applicable so-called compelling interest prong of the *Sherbert-Yoder* test, it would misguide the analysis to

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[154] NUSSBAUM, *supra* note 40, at 328–29.

[155] *See* Sherbert v. Verner, 374 U.S. 398, 403 (1963).

[156] Eisgruber & Sager, *Vulnerability of Conscience*, *supra* note 42, at 1247. Eisgruber & Sager point out that this impression of a weak test is not isolated among commentators. *Id.* at 1247 n.13 (collecting similar opinions). Even those who reject *Employment Division* are sometimes in the seemingly embarrassing position of noting the thinness of the rationales offered where "compelling interest" is taken to be satisfied. For example, Nussbaum criticizes O'Connor's concurrence in *Employment Division*—in which O'Connor agreed that Oregon's criminalization of all uses of peyote was constitutional, but applied the *Sherbert* test to reach that result—for setting too low of a bar for "compelling interest." NUSSBAUM, *supra* note 40, at 173.

[157] Eisgruber & Sager, *Vulnerability of Conscience*, *supra* note 42, at 1247.

[158] This, at any rate, is one way to take Justice Scalia's emphasis in *Employment Division* on the fact that plaintiffs rarely won before the Supreme Court under the *Sherbert-Yoder* framework. *See* Employment Div. v. Smith, 494 U.S. 872, 882–85 (1990).

work out the content or criterion of such a standard by analogy to cases outside the free exercise context just because such cases also use the phrase "compelling interest."[159]

Yoder is a better place to look for guidance; the Court in *Yoder*—the closest analogous Supreme Court case to the present hypothetical, and the Court's only non-employment case decided in favor of the religious plaintiffs—rejected the argument that a general state interest in universal education could overcome the substantial burden which aspects of that education placed on the Amish.[160] In particular, the Court failed to see any harm to Amish youth if they were *not* obliged to attend high school as mandated by Wisconsin's compulsory attendance law.[161] Arguably, this judgment partly stemmed from Wisconsin's failure to advance any serious theory or showing of such harm that particularly applied to the Amish youth, a failure noticed at oral arguments.[162] The state argued instead that religious scruples should not stand in the way of a generally applicable law requiring compulsory high school education for all youth.[163] In 1972, anyway, the Court found this unconvincing.[164] Faced with a believable account of some

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[159] *But cf.* van Geel, *supra* note 19, at 361–62 (deferring to a dissent by Justice Brennan in a free speech case turning on "compelling interest").

[160] Wisconsin v. Yoder, 406 U.S. 205, 215 (1972).

[161] *Id.* at 222.

[162] Audio: Oral Arguments in Wisconsin v. Yoder 47:00 (Dec. 8, 1971), *available at* http://www.oyez.org/cases/1970-1979/1971/1971_70_110/argument/70-110_19711208-argument.mp3 (respondent's counsel notes that no expert witness articulated harm to the state at the trial). In its brief, the state suggested that an interest in "democratic ideals," and the "dangers of ignorance," counseled in favor of mandating high school education for the Amish youth. *See* Pet'r's Br. 12, Wisconsin v. Yoder, 406 U.S. 205 (1972) (No. 70-110), 1971 WL 133705. The state's argument, however, seldom retreated from such general and abstract pronouncements. In arguing for the supposed interest of the state in "education" generally, the state neglected to demonstrate the importance of a high school education in particular to the Amish youth; the state similarly did not argue for the state's interest in the particular elements of any curriculum. *See, e.g.*, *id.* at 12, 18 (arguing that the state has an interest in ensuring that Amish children "receive an education" generally).

[163] *Yoder*, 406 U.S. at 219 ("Wisconsin . . . argues that 'actions,' even though religiously grounded, are outside the protection of the First Amendment.").

[164] One Comment questions whether *Yoder* would be similarly decided today. Lisa Biedrzycki, Comment, *"Conformed to this World": A Challenge to the Continued Justification of the* Wisconsin v. Yoder *Education Exception in a Changed Old Order Amish Society*, 79 TEMP. L. REV. 249, 250 (2006). In general, *Yoder* has been the subject of a fair amount of criticism from a variety of perspectives. Amy Gutmann, for example, criticizes *Yoder*'s accommodation ("one-way protection") for failing to account for or appreciate the value of "legitimate democratic laws:"

tangible, human harm avoided or particular interest served by the Critical Discussions curriculum, however, *Yoder* should be distinguished.

This Note now turns to the task of articulating the needed account of "tangible, human harm" avoided or vital interest served by the Critical Discussions curriculum. The argument proceeds in two steps: first, it is argued that Critical Discussions develops skills associated with a model open discourse; second, this Note argues that it is in the interest of the state to develop these skills in *all* students. Two alternative reasons are offered for this latter claim: first, it is in the interest of the state to have a citizenry in which the skills of open discourse are maximally distributed; second, it is in the interest of all children themselves to have such particular skills (and it is in the interest of the state to advance children's interests).

1. *Critical Discussions and Skills of Open Discourse*

One reason to require a course such as Critical Discussion is because it will develop the very skills of open discourse that the *Weisman* Court professed to prize.[165] These skills can be thought of as the very skills encountered in (or which would constitute) a model discussion of a controversial topic with deeply felt disagreements. Such skills include an ability to be empathetic to others, an ability to consider one's own position from another viewpoint, and an ability to identify and offer reasons for one's own position which one's interlocutor is bound (from his own perspective) to accept. Participants in a model discussion would interpret their interlocutors according to a principle of charity—i.e., in the best light. A model discussion would also involve a component of emotional maturity, defined here as an ability to keep one's emotions from clouding judgment in ways that would be rejected if thinking clearly about one's own deepest principles and values. This, in turn, requires some degree of self-reflection so that one's own principles and values are clear to oneself in the first place.

There is some reason to think that the Critical Discussions curriculum, or something like it, would be necessary to providing students with these sorts

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> Maximizing accommodation of conscience means minimizing democratic self-government, and one-way protectionists fail to offer good reasons why conscience—regardless of its content—should be given priority over legitimate democratic laws. Legitimate democratic laws, after all, also reflect the ethical commitments of individuals as citizens concerning how their society should be governed.

AMY GUTMANN, IDENTITY IN DEMOCRACY 183–84 (2003). It should probably be emphasized that at least some of the disagreements over *Yoder* are reflections of related disagreements between *neutral law* and *accomodationist* approaches to free exercise generally. *See supra* Part II.A.1.

[165] Lee v. Weisman, 505 U.S. 577, 590 (1992).

of skills. As defined here, skills of open discourse are in some ways unnatural. Where discussion is really *open* such that important disagreements are not sublimated or ignored, the constant temptation is to paint one's dialogic opponent in the worst possible light, to exaggerate differences,[166] or to shy away from the ways in which an opposing viewpoint may require deeper reflection on one's own principles.[167] Consequently, it is natural that help is needed to develop these skills of discourse,[168] and one sensible way to do this is by modeling such skills directly in the discussion of a controversial or deeply felt topic in a community hopefully *not* of completely like-minded people, guided by a knowledgeable teacher. The Critical Discussions curriculum provides just this help.

2. *The Interest of the State in Developing Skills of Open Discourse*

But just why is it so important for *each and every* student to have these skills of open discourse? Why not allow students who object to developing such skills to opt out of the curriculum?

At least two kinds of answers are possible to these skeptical questions. One kind of answer focuses on the interest of the state in having a citizenry with certain minimum skills, while the second kind of answer focuses on the interests of the involved children themselves. Both kinds of answers are suggested in this Note, although this subpart focuses on the first.

In general, we accept the inculcation of socially valuable skills into children as a legitimate exercise of state power; we accept, for example, the strong interest of the state in basic literacy or math education. Given a choice between a society in which these skills are distributed maximally and one in which these skills are not distributed maximally, we generally prefer the former and enact policies in furtherance of that end. Society will be better off

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166 *See* Robert Robinson et al., *Actual Versus Assumed Differences in Construal: "Naïve Realism" in Intergroup Perception and Conflict*, 68 J. PERSONALITY & SOC. PSYCHOL. 404, 404 (1995) (empirical study demonstrating that group partisans overestimate their degree of disagreement with other, stereotypically-opposed groups).

167 *Cf.* Emily Pronin, *Perception and Misperception of Bias in Human Judgment*, 11 TRENDS IN COGNITIVE SCI. 37, 40 (2006) (arguing for the reality of a "bias-perception conflict spiral" in which the over-attribution of bias to others, generated in part by a view of oneself as the paradigm of reasonableness, leads to (pointless) conflict).

168 *Cf.* Grants.gov, http://www.grants.gov/search/search.do?oppId=46604&flag2006=false&mode=VIEW (last visited September 5, 2009). The United States Agency for International Development—a federal agency concerned with foreign aid—offered a grant opportunity for "Improved Public Policy Discourse in Georgia." The stated goal was to "foster a more pluralistic and higher quality exchange of ideas and to promote more active engagement of Georgian citizens in public policy discussions." It would of course be tragically ironic if the Constitution forbade pursuing the same important aim domestically.

if math and literacy skills are commonplace, and society will be harmed or made worse *unless* such skills are commonplace. For this reason, if someone manages not to obtain basic literacy or math skills, that counts as an instance of social failure, and something worth remedying (by better policies or better execution).

Given our acceptance of the involved principle, the question with regard to developing skills of open discourse is simply one of particular judgment: why shouldn't skills of open discourse be treated like skills of literacy or mathematics? Surely a democratic society with maximally distributed skills of open discourse is preferable to its opposite. More than that, any society in which these skills are *not* generally distributed is relatively worse off, and this constitutes a harm that the state should aim to remedy via its educational policy choices.

This last point deserves elaboration, because it is tempting to think that we Americans have gotten along well enough without common education in skills of open discourse, and so why the worry?[169] But, in fact, we have not gotten along well enough. Our national politics are hamstrung by narrow partisanship, balkanized into groups incapable of transcending their particular viewpoints even if just for the sake of argument, and infused generally with a poisonous and instinctive dislike for good habits of open discourse.[170] And to the extent that we consequently lack the conceptual tools or skills to frame our disagreements constructively, this is a problem worth fixing.

The problem is not that we disagree with each other (there may be no cure for this, or none wanted); the problem is *how* we disagree, and that we too frequently discuss and frame our disagreements badly. This itself constitutes a social harm, but it has further harmful effects. An impaired public discourse can be partially blamed for widespread cynicism and non-participation in the political life of the nation, a state of affairs that a clear-

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[169] *Cf., e.g.*, van Geel, *supra* note 19, at 361–62, 369. Van Geel suggests that a compelling interest should not be found in cases where the interest in question has not been "comprehensively" pursued elsewhere. This criterion of compelling interest—and its companion criterion of actual "consensus" agreement on the goal being pursued—comes close to elevating the status quo to the level of first constitutional principle. Where a state comes to understand its actual interests in new and deeper ways, these criterions effectively ensure in advance that the newly-discovered interest will *not* be regarded as compelling, at least for a while, and whatever the state of the attendant normative arguments.

[170] *Cf.* Barack Obama, U.S. President, Inaugural Address (Jan. 20, 2009), *in* N.Y. TIMES, Jan. 20, 2009, at P2 ("On this day, we come to proclaim an end to the petty grievances and false promises, the recriminations and worn-out dogmas that for far too long have strangled our politics.")

thinking democratic state should regard as relatively worse.[171] And an impaired public discourse might also lead to blinkered, reactive policy-making.

There is simply no good reason for a state to accept this relatively worse state of affairs. There are *bad* reasons for maintaining the status quo, of course: habit, defeatism, cynicism, or the sheer lack of imagination. The harm of not having skills of open discourse is not an *obvious* harm only because the present worse state of affairs is comfortably typical. But it is a harm nevertheless, and a harm which Critical Discussions could remedy through the development of an unnatural skill-set—namely, just those skills of open discourse.

Of course, students may not practice their skills of open discourse outside of the prescribed course. But they also might not ever read a book or do a sum outside of school. Unless the latter is a reason for the state to abandon basic literacy or math education given its general strong interest in the maximal distribution of such skills, the fact that some students may not practice skills of open discourse similarly cannot be a reason for the state to abandon a policy of developing such skills generally. If this form of argument is unacceptable in the one case, it is similarly unacceptable in the other. Consequently, the state's interests should not be identified with a prediction about what any particular person will do with a particular skill (and even the religious plaintiff may have a false idea of their future self).

3. *Students' Interests in Critical Discussions*

To extend the working analogy a little: general literacy education makes sensible policy because it serves the interests of a democratic state to have a literate population. In other words, widespread literacy is a good social effect. But there is another reason to support literacy education: it serves the interest of the students themselves, and their future selves. In a literate world, illiteracy is a disability.

Similarly, people lacking skills of open discourse are, from the point of view of their own well-being (as distinct from the well-being of the state or society generally), unavoidably worse off. Questions of religion, ethics, and values are, over the course of a lifetime, practically unavoidable. To only be able to deal with such issues from the confines of a single received tradition—to lack an ability to imagine other viewpoints, or an ability to reason with different others about ethical issues, or to give and receive ethical reasons generally—is to be impaired or disabled in a way. It is to have

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[171] *See* John Dean, *Why Americans Don't Vote—and How that Might Change*, CNN, Nov. 8, 2000, http://edition.cnn.com/2000/LAW/11/columns/fl.dean.voters.02.11.07/ (blaming such factors for general voter apathy).

one's beliefs causally and not normatively determined.[172] Moreover, the value of conscience itself suggests the importance of being able to question one's own values and principles well.

Given the personal interests that students have in developing the kinds of skills aimed at by Critical Discussions, an additional way of understanding the state's interest becomes clear. By mandating participation in the Critical Discussions curriculum, the state protects the interests of children in developing these skills. On the other hand, those who would actively refuse children's development of these skills mistreat children by imposing, or attempting to impose, a kind of functional disability.

Incidentally, whether students in fact have these interests is separate from the question of whether they (or their families) *recognize* themselves as having these interests. Where the question is about the existence of such interests as a matter of fact, it should not simply be asserted, by way of answer, that the student's religion opposes the development of these abilities.[173] Such an argument would be rejected in other contexts: an

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[172] *See supra* Part II.B.3.

[173] *But cf.* Fish, *supra* note 116, at 887–88. Fish seems to make just this kind of move. Fish points out that Vicki Frost (the *Mozert* plaintiff) would not respect the state's professed interest in exposing her children to material at odds with her religious commitment, because "[t]he value assumed by the court that denied her relief—the value of developing the ability to see the many sides of every question—is not only not her value; it is in her eyes the way and vehicle of all evil." *Id.* at 887. Partially on this basis, Fish himself rejects as untenable any distinction between 'exposure' and 'coercion.' *Id.* at 888. However Fish might have ultimately ruled on a case like *Mozert* if he were the judge, it is clear that the viewpoint of the religious plaintiff would all but determine certain aspects of his analysis.

Fish makes a somewhat broader point, worth briefly responding to, along the same lines when he argues against the advisability of any general program of "making up your own mind independently of any external authority" (or of helping students to do such things). *Id.* Such a program is simply impossible, Fish argues, and ought to be abandoned as any kind of goal guiding educational policy:

> If exposure *is* indoctrination, in the sense that an idea introduced into the mind becomes part of its equipment, one of the lenses through which and with which the world is processed and configured, then the declared goal of liberal education, the goal of preparing students for 'autonomous decisions making,' is not achievable and in fact has been rendered unavailable in the first moment of consciousness.

Id. With this, Fish seems to suppose that there is something—he says not what—about merely *having* pre-existing conceptual "equipment" which is antithetical to being autonomous, or to "autonomous decisions making," at least. (Or if Fish does *not* mean to identify autonomy essentially with *being in a conceptual vacuum*, then why in denying the possibility of "autonomous decisions making" is it relevant at all to suggest that ideas become part of our mental "equipment" as a consequence of our being exposed to them?) But taken as a theory of autonomy, at least, such a view hardly seems credible. *Of course* autonomy is not about lacking any received conceptual equipment; surely only a being

illiterate person might think that skills of literacy are overrated, but this would not settle the question of whether literacy skills are in fact worthwhile, or whether the state has a compelling interest in teaching literacy. It similarly should not settle the present question that a person from an illiberal religious tradition fails to appreciate the value of certain (liberal) practices of dialogue and ethical reasoning. And if those interests are real and serious then the state can be justified in enacting policy sensitive to those interests.

Consequently, whether the argument focuses on the good social effects of skills of open discourse generally, or the value of such skills to individuals particularly, the state's interest in fostering the development of such skills is properly viewed as compelling. This conclusion is reinforced by the relatively weak meaning of 'compelling' in the free exercise arena under *Sherbert* and *Yoder*.[174] And with the compelling interest prong satisfied, Critical Discussions remains constitutional under the free exercise clause even under a hybrid-rights theory, whatever its effect on the conscience of religious objectors.

III. THE PARENTAL RIGHTS CHALLENGE

A hypothetical religious plaintiff challenging Critical Discussions might present a Substantive Due Process parental rights challenge for either or both of two reasons: first, because a parental rights challenge could serve to

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with some initial concepts *could be* autonomous. And surely the backers of "autonomous decisions making" did not actually have the idea of decision-making by actors without concepts. In which case, Fish argues against a straw man.

If the problem for Fish and his convinced readers is his or their failure to have imagined *any* alternate view of autonomy, then a suggestion or two meant to help prime the pump of theoretical imagination might be in order. Perhaps autonomy is about (or partially about) being reflective. If so, then why should merely *having* a conceptual framework, however received, make reflection, even reflection on that very conceptual framework, impossible? (Certainly Fish finds himself able to reflect on theoretical frameworks despite the handicap of possessing received conceptual equipment.) Or perhaps autonomy is about (or partially about) being appropriately sensitive to reasons, as, for example, in guiding actions or theorizing about the world. If so, why should being thus appropriately sensitive to reasons be impossible for someone with "lenses through which and with which the world is processed and configured"? (Could someone without *any* such "lenses" be sensitive to anything at all?) Here, I mean merely to point out some other possible ways of proceeding before dumping the concept of autonomy on the trash heap of intellectual history—a radical step which, one might hope, would only be an ultimate last resort. Certainly, if autonomy is understood in either of these ways (or maybe others), then Fish's foundational attack on the "goal of liberal education" fails, insofar as children *can* be taught to be reflective and sensitive to reasons (and why should that not be possible?).

[174] *See supra* Part II.C.

strengthen the free exercise case under a hybrid-rights theory,[175] or because a parental rights challenge potentially provides an independent free-standing basis on which a court could determine mandatory Critical Discussion to be improper. Whatever the fate of the free exercise challenge, a court could still reject the constitutionality of mandatory Critical Discussions on a parental rights theory. Thus, the parental rights challenge deserves the separate consideration provided here.

A. *"Fundamental" Parental Rights and Rational Basis Review*

As recently as *Troxel v. Granville*, [176] the Supreme Court has acknowledged that parental rights are "fundamental."[177] Tracing parental rights jurisprudence, the *Troxel* Court acknowledged the influence of the original parental rights cases of *Meyer*[178] and *Pierce*[179] in taking this right to involve some measure of control over the upbringing of the parent's child. [180] In *Meyer*, the Court overturned the conviction of a schoolteacher who taught German contrary to state law, declaring the right of parents "to control the education of their own."[181] In *Pierce*, the Court rejected a law effectively outlawing the existence of private parochial schools, declaring a right of

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[175] *See supra* Part II.A.1 (explaining the hybrid rights theory); *supra* Part II.B (analyzing the likely result given a free exercise challenge under the hybrid rights theory).

[176] 530 U.S. 57 (2000).

[177] *Id.* at 66 (plurality). *Troxel* did not command a majority opinion, but the plurality's use of the word "fundamental" to describe the parental right was echoed by Justice Thomas's concurrence, thus giving majority authority for the proposition that parental rights are "fundamental." *Id.* at 80 (Thomas, J., concurring) ("Consequently, I agree with the plurality that this Court's recognition of a fundamental right of parents to direct the upbringing of their children resolves this case."). At least one pre-*Troxel* court took the question of whether parental rights are "fundamental" to be unsettled. Brown v. Hot, Sexy, & Safer Prods., Inc., 68 F.3d 525, 533 (1st Cir. 1995), *cert. denied*, 516 U.S. 1159 (1996). But despite the implication, *Troxel* was not the first Supreme Court case to use the word "fundamental" in describing the interests of parents in raising their children. Santosky v. Kramer, 455 U.S. 745, 753 (1982) (speaking of "[t]he fundamental liberty interest of natural parents in the care, custody, and management of their child").

[178] Meyer v. Nebraska, 262 U.S. 390 (1923).

[179] Pierce v. Soc'y of the Sisters of the Holy Names of Jesus & Mary, 268 U.S. 510 (1925).

[180] *Troxel*, 530 U.S. at 66; *id.* at 80 (Thomas, J., concurring). The connection of parental rights to *Meyer* and *Pierce* is enough of a commonplace that protected parental rights are sometimes simply called the *Meyer-Pierce* right. *E.g.*, Fields v. Palmdale Sch. Dist., 427 F.3d 1197, 1204 (9th Cir. 2005).

[181] *Meyer*, 262 U.S. at 401.

parents and guardians "to direct the upbringing and education of children under their control."[182]

Judging the measure of parental rights by these declarations alone, one might predict that strict scrutiny would apply to state policy infringing on such rights.[183] One would be wrong.[184] *Pierce* instead suggested and applied a rational basis level of review where the state's policy implicated parental rights.[185] *Pierce* read *Meyer* as applying a similar standard.[186] And in rejecting a Washington law that accorded essentially no weight to parental preference in determining a child's visitation schedule, *Troxel*'s plurality

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[182] *Pierce*, 268 U.S. at 534–35.

[183] State actions infringing fundamental right are generally subjected to strict scrutiny. *See, e.g.*, Skinner v. Oklahoma *ex rel.* Williamson, 316 U.S. 533, 541 (1942) (strictly scrutinizing a state policy of forced sterilization of prisoners); Griswold v. Connecticut, 381 U.S. 479, 485–86 (1965) (strictly scrutinizing state infringement of privacy rights).

[184] *Cf.* William G. Ross, *The Contemporary Significance of Meyer and Pierce for Parental Rights Issues Involving Education*, 34 AKRON L. REV. 177, 187 (2000) (acknowledging a practice of rational basis review as the usual level of scrutiny for parental rights claims).

[185] *Pierce*, 268 U.S. at 534–35:

> Under the doctrine of *Meyer v. Nebraska*, we think it entirely plain that the Act of 1922 unreasonably interferes with the liberty of parents and guardians to direct the upbringing and education of children under their control. As often heretofore pointed out, rights guaranteed by the Constitution may not be abridged by legislation which has no reasonable relation to some purpose within the competency of the state.

The *Pierce* court also suggested all the ways in which it was *not* limiting state authority:

> No question is raised concerning the power of the state reasonably to regulate all schools, to inspect, supervise and examine them, their teachers and pupils; to require that all children of proper age attend some school, that teachers shall be of good moral character and patriotic disposition, that certain studies plainly essential to good citizenship must be taught, and that nothing be taught which is manifestly inimical to the public welfare.

Id. at 534.

[186] *Id.* at 534–35. *Meyer* and *Pierce*'s application of a level of review far below strict scrutiny was remarked upon by the First Circuit Court of Appeals in *Brown v. Hot, Sexy, and Safer Products, Inc.*, 68 F.3d 525, 533 n.5 (1st Cir. 1995). The court in *Brown* quoted *Meyer*:

> The established doctrine is that this liberty may not be interfered with, under the guise of protecting the public interest, by legislative action which is arbitrary or without reasonable relation to some purpose within the competency of the State to effect.

Meyer, 262 U.S. at 399–400.

similarly failed to apply strict scrutiny analysis.[187] It is plausible to read the *Troxel* plurality as simply concerned to give parental preference *some* weight—some presumptive validity— in a dispute over visitation.[188] This limited holding,[189] despite its fundamental rights rhetoric, is consistent with the rational basis level of review advanced in *Meyer* and *Pierce* where parental rights were similarly taken to be concerned. Judging from *Troxel*, at most, only Justice Thomas would apply strict scrutiny review in parental rights cases.[190]

This rational basis level of review for state policy purportedly infringing parental rights does not help religious plaintiffs challenging Critical Discussions. If there are reasons for mandating the Critical Discussions course sufficient to constitute a compelling state interest as argued above,[191] then there are surely reasons sufficient to meet the challenge of mere *rational*

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[187] Justice Thomas's concurrence specifically chides the plurality on this score: "The opinions of the plurality, Justice Kennedy, and Justice Souter recognize such a [parental] right, but curiously none of them articulates the appropriate standard of review." Troxel v. Granville, 530 U.S. 57, 80 (2000) (Thomas, J., concurring).

[188] From the Court in *Troxel*:

> The Washington Superior Court failed to accord the determination of Granville, a fit custodial parent, any material weight. . . . As we have explained, the Due Process Clause does not permit a State to infringe on the fundamental right of parents to make child rearing decisions simply because a state judge believes a "better" decision could be made.

Id. at 72–73 (plurality opinion); *cf.* Susan E. Lawrence, *Substantive Due Process and Parental Rights: From* Meyer v. Nebraska *to* Troxel v. Granville, 8 J.L. & FAM. STUD. 71, 103 (2006) (similarly reading *Troxel*: "[t]he parental right O'Connor's opinion protects is the right of a *fit, custodial* parent to enjoy the law's presumption that parents act in the best interest of their children.").

[189] O'Connor's plurality narrowed its holding within the already-narrow context of the family law of visitation:

> [W]e do not consider the primary constitutional question passed on by the Washington Supreme Court—whether the Due Process Clause requires all nonparental visitation statutes to include a showing of harm or potential harm to the child as a condition precedent to granting visitation. We do not, and need not, define today the precise scope of the parental due process right in the visitation context. In this respect, we agree with Justice Kennedy that the constitutionality of any standard for awarding visitation turns on the specific manner in which that standard is applied and that the constitutional protections in this area are best 'elaborated with care.'

Troxel, 530 U.S. at 73.

[190] *Id.* at 80 (Thomas, J., concurring) (criticizing the rest of the Court for failing to articulate and apply a strict scrutiny standard). Even this much is questionable, however. Justice Thomas explicitly reserved the question of whether or not the Substantive Due Process theory underlying the claim to fundamental parental rights is meritorious. *Id.*

[191] *See supra* Part II.C.

basis review in light of parental rights.[192] Unless perhaps the religious plaintiff could convince the Supreme Court to apply strict scrutiny review for the first time, such a plaintiff would almost certainly lose the parental rights claim.

B. *Parental Veto Power over Curriculum and the Content of Parental Rights*

In order to defeat a parental rights challenge, the state must argue for its interests in the Critical Discussions curriculum. At this point, however, it would be redundant to rehash the nature of the state interest in Critical Discussions in arguing that the state can meet a minimal rational basis level of review.[193] And, besides, such an analysis already makes a critical assumption: that parental rights in the first place encompass a veto power over general curriculum mandates. This assumption is critical because, if it is false, then a parental rights challenge to Critical Discussions fails to even be legally sensible. Unless there is a parental right to manage curriculum more basic than the state's right to do the same, the challenge fails. This section argues that, in fact, it *is* false to assume that parental rights generally encompass a veto power over objectionable curriculum.

Meyer, one of the original parental rights cases under the Fourteenth Amendment, suggested that parental rights include a right "to control the education of their own."[194] *Meyer* took this parental control to prevent the state from forbidding instruction in a particular subject (modern languages) against parental objection.[195] The parental right of control applied, in other words, against the actor seeking to limit the child's education—in that case, the state. But where the *parent* is seeking to limit the child's education in some way, it is not clear that much can be said in favor of such parental rights. Obviously, such a right would not encompass any privilege of parents to affirmatively impose illiteracy on their children by actively preventing them from gaining literacy skills, nor do parents generally have a right to exempt their children from any and all kinds of education.[196]

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[192] *See supra* Part II.B–C (arguing that the state's interest in Critical Discussion meets a "compelling interest" standard of review).

[193] *See* Part II.C.

[194] Meyer v. Nebraska, 262 U.S. 390, 401 (1923).

[195] *Id.* at 403.

[196] *See* Ross, *supra* note 184, at 184. Ross points to one court's *reduction*: clearly a parent claiming an unrestricted right "to control the education" of their children would not be excused, under the color of such a right, in teaching their truant child "to be a safe-cracker or prostitute." Hubbard v. Buffalo Indep. Sch. Dist., 20 F. Supp. 2d 1012, 1015 (W.D. Tex. 1998).

But if just a little armchair reflection reveals obvious limitations to the content of *Meyer*'s parental right "to control the education of their own," those limits with respect to school curriculum were suggested in even stronger terms two years later by the Court itself in *Pierce*. There, the Court emphasized:

> No question is raised concerning the power of the state reasonably to regulate all schools, to inspect, supervise and examine them, their teachers and pupils; to require that all children of proper age attend some school, that teachers shall be of good moral character and patriotic disposition, that certain studies plainly essential to good citizenship must be taught, and that nothing be taught which is manifestly inimical to the public welfare.[197]

This is dicta, but it is dicta with some currency, repeated in a different form in Justice White's *Yoder* concurrence,[198] and arguably underlying (in spirit at least) the numerous circuit court decisions rejecting accommodation of parental concerns in school policy and curriculum.[199]

Indeed, the fact of widespread circuit court rejection of parental attempts to control the public school curriculum has been recognized—and decried—by some who seek relatively more accommodation of parental concerns.[200] In a post-*Troxel* 2005 case, for example, the Ninth Circuit in *Fields* upheld

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[197] Pierce v. Soc'y of the Sisters of the Holy Names of Jesus & Mary, 268 U.S. 510, 534 (1925).

[198] Wisconsin v. Yoder, 406 U.S. 205, 239 (1972) (White, J., concurring) (explaining that the notion of parental rights endorsed by the Court "lends no support to the contention that parents may replace state educational requirements with their own idiosyncratic views of what knowledge a child needs to be a productive and happy member of society"). In *Runyon v. McCrary*, the Court repeated Justice White's line in rejecting the parental rights claim in that case and any absolute conception of parental rights. 427 U.S. 160, 177 (1976).

[199] *See, e.g.*, Brown v. Hot, Sexy, & Safer Prods. Inc., 68 F.3d 525, 539 (1st Cir. 1995) (sexually explicit class could not be avoided by religiously-objecting student and parents); Fleischfresser v. Dirs. of Sch. Dist. 200, 15 F.3d 680, 690 (7th Cir. 1994) (refusing to accommodate parental objections to a supplementary reading program); Mozert v. Hawkins County Bd. of Educ., 827 F.2d 1058, 1080–81 (6th Cir. 1987) (refusing to accommodate wide-ranging parental objections to the textbooks used by the school); Leebaert v. Harrington, 332 F.3d 134, 145 (2d Cir. 2003) (refusing to accommodate a parental objection to the mandatory health program); and Fields v. Palmdale Sch. Dist., 427 F.3d 1197, 1211 (9th Cir. 2005) (refusing to hold the distribution of a sexually-oriented survey to elementary school students to be violative of parental rights). *Fields* collects and comments on a half-dozen more circuit court cases in the same vein. *See id.* at 1204–05.

[200] *See, e.g.*, Home School Legal Defense Association, Why Do We Need Parental Rights Legislation? (Nov. 11, 2004), http://www.hslda.org/docs/nche/000000/00000027.asp.

the constitutionality of an elementary school survey about sexual topics over parental objections. [201] The *Fields* decision was criticized by one commentator for failing to respect the proper integrity of the "parent-child relationship."[202] In defending a more robust version of the "right of a parent to control his child's upbringing"[203] than the *Fields* court was willing to recognize, however, even this critic acknowledged the unworkability of interpreting the parental right to include veto power over state curriculum choices, at least in public schools.[204]

But if parents properly lack the general power to veto state-mandated curriculum in the public school context, the same appears true in the private school context, although such cases arise less frequently.[205] In *Runyon v. McCrary*, the Court upheld a federal law which had the effect of outlawing racially-segregated private schools in the face of a parental rights challenge.[206] As in *Meyer* and *Pierce*, the Court suggested limits to parental rights, even in the private school context:

The Court has repeatedly stressed that while parents have a constitutional right to send their children to private schools and a constitutional right to select private schools that offer specialized instruction, they have no constitutional right to provide their children with private school education unfettered by reasonable government regulation.[207]

Relying on this language, the Sixth Circuit subsequently rejected a challenge to a state testing requirement applicable to private schools.[208] Arguably, an ability to control testing requirements just is an ability to control the curriculum to some extent. Even in the private school context, then, courts have held that parental rights are ultimately subordinate to state mandates.

However *Meyer*'s parental right "to control the education of their own" is particularly construed, these cases demonstrate convincingly that such a right simply does not encompass veto power over reasonable state curricular

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[201] Fields v. Palmdale Sch. Dist., 427 F.3d 1197, 1200 (9th Cir. 2005). The survey asked about the "frequency of 'thinking about having sex' and 'thinking about touching other peoples' private parts.'" *Id.*

[202] Elliot M. Davis, *Unjustly Usurping the Parental Right:* Fields v. Palmdale Sch. Dist., *427 F.3d 119 (9th Cir. 2005)*, 29 HARV. J.L. & PUB. POL'Y 1133, 1134 (2006).

[203] *Id.* at 1133.

[204] *Id.* at 1139 ("If the *Meyer-Pierce* framework allowed parents to exercise control over the curriculum, the system of public education would be wholly impractical and unworkable.").

[205] Although *Pierce* was itself a private school case.

[206] 427 U.S. 160, 178 (1976).

[207] *Id.*

[208] Ohio Ass'n of Indep. Schs. v. Goff, 92 F.3d 419, 423 (6th Cir. 1996).

mandates in general. It might be thought that, to the extent parents can meet state standards, then they should have control over the curriculum. In this vein, some states regulate home schooling.[209] But it would be a mistake to view this kind of parental control as establishing or indicating the primacy of the parent over the state in determining curriculum choices. By giving the state the right of defining the standards to be met, such laws already presume the subordination of parental control to the interests of the state, consistently with the declarations of the Court since at least *Pierce*. And without any presumptive right to control the curriculum, the parental rights challenge to Critical Discussions, as a curriculum challenge, goes nowhere.

IV. CONCLUSION

The hypothetical religious plaintiff objecting to mandatory Critical Discussions faces several significant hurdles in the quest for a constitutional exemption from participation, even assuming that such a curriculum represents a bona fide substantial burden on the plaintiff's religious conscience. As regards the free exercise challenge, the plaintiff must first establish the inapplicability of *Employment Division*'s deference to neutral state law; given this wide deference, the state wins since, by hypothesis, the curriculum applies to everyone and is not motivated against any particular view.[210] Possibly, *Employment Division*'s wide deference to the state can be avoided by the application of the hybrid-rights theory; under this theory, raising a second related rights-claim will heighten the level of scrutiny applicable to the state *vis-à-vis* the free exercise claim.[211]

This strategy, however, encompasses its own challenges. First, the hybrid rights theory is an uncertain doctrine rejected by some federal circuit courts of appeals.[212] Second, even assuming application of the hybrid-rights doctrine, and that a free exercise case can be brought under this theory, the hurdle set for the state is a low one. Despite its harsh ring, the "compelling interest" standard in this context historically reflects a weak standard.[213] If the state can meet this standard, as argued here,[214] the plaintiff loses.

Even (generously) assuming the general viability of the hybrid rights theory, the application of this theory to a particular case depends on the ability of plaintiffs to raise a second related claim, such as a parental rights

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[209] *E.g.*, 24 PA. STAT. ANN. § 13-1327.1 (2008) (Pennsylvania law mandating curricular requirements for homeschoolers and requiring yearly evaluations).

[210] *See supra* Part II.A.2.

[211] *See supra* Part II.A.2.

[212] *See supra* Part II.A.2.

[213] *See supra* Part II.C.

[214] *See supra* Part II.C.

claim.[215] This point may itself be non-trivial: if the additional claim is itself defeated, then the application of the hybrid-rights theory may also be rejected.[216] Certainly, if, as argued here, the content of the 'parental rights' concept excludes any general power to veto state curriculum choices,[217] then, as a matter of law, the parental rights claim (as part of a broader objection to Critical Discussions) fails to be properly sensible as such. Even before a circuit court taking the most generous view of the hybrid rights theory, this would properly mean that the theory would not apply in that instance.[218]

As an independent matter, however, the parental rights claim deserves rejection whatever the fate of this Note's argument regarding the very legal meaning of parental rights. Assuming *arguendo* that parental rights encompasses some veto power over state curriculum choices, such power only extends to non-rational state action. That is, the Supreme Court has consistently articulated a rational basis standard of review for state action infringing on "fundamental" parental rights.[219] The circuit courts have consistently followed this lead, much to the chagrin of those advocating a stronger version of parental rights than the courts have seemed willing to accept.[220] Critical Discussions, a course which seeks to give students generally useful skills, is all but certain to satisfy this minimal scrutiny.[221]

In its own terms, Critical Discussions does not represent an attempt at viewpoint indoctrination; it would be entirely consistent with the envisioned curriculum, for example, to require that the teacher's own particular views on controversial topics remain a mystery in the classroom. Critical Discussions is instead about fostering open discourse—and, in particular, *skills* of open discourse in relation to important, controversial issues—of the kind praised by the Court in *Weisman*.[222]

Arguably, the state has an interest in fostering these skills of open discourse no less than other kinds of skills, such as literacy or mathematics.[223] To those comfortable with the status quo, healthy or not, this claim can appear grand or exaggerated. But easy cynicism should be rejected

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[215] *See supra* Part II.A.1.

[216] *See supra* note 74. And even in those circuit courts that do not require vindication of the additional right, there is nevertheless a requirement that the additional right express a serious claim on which success might, initially, be thought possible. *See supra* note 74.

[217] *See supra* Part III.B.

[218] *Cf. supra* note 74.

[219] *See supra* Part III.A.

[220] *See supra* note 200.

[221] *See supra* Part III.A.

[222] Lee v. Weisman, 505 U.S. 577, 590 (1992).

[223] *See supra* Part II.C.1–2.

here in favor of serious reflection: is civil society worse off for a lack of skills of open discourse among its members? Are individuals worse off for lacking such skills? I think so; and if so, any religions that prevent the acquisition and distribution of such skills do real harm.

In evaluating the nature of the state's interest in Critical Discussions, political, philosophical, and value questions are raised. Such questions are unavoidable. Questions of the state's interests in a balancing test (as between 'substantial burden' and 'compelling interest') are unanswerable absent some vision of what counts as the social good generally. And, necessarily, in finally identifying the social good or its aspects in some way, not every view can be accommodated. Let each marshal what arguments and vision he may have; you now know the basics of mine: my idea of social good involves promoting an ethos of truly open discourse, especially in relation to important issues of ethics and value.

Finally, it perhaps bears emphasis that, in arguing for the importance of open discourse and skills of open discourse on important topics like religion and ethics, the point is not to wholly eliminate important differences on these matters. The point is rather to encourage and improve the discussion of such differences. Because religious, ethical, and value questions are important and do frequently matter, they deserve to be discussed openly, accountably, decently, and in their own terms, at least some of the time.[224] People and societies better capable of these open discussions are simply better off, all things considered. And, fortunately, there is no constitutional reason to prevent the cultivation of these capacities through a mandatory Critical Discussions curriculum.

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[224] Admittedly, this vision rejects certain conceptions of "tolerance." In particular, the view is that a civil "tolerance" that sublimates, ignores or—worse—patronizes important differences (as mere differences in taste or tradition, for example) deserves neither unqualified praise nor careless assent. *See* WENDY BROWN, REGULATING AVERSION: TOLERANCE IN THE AGE OF IDENTITY AND EMPIRE 39 (2008) (arguing that Lockean toleration ultimately sublimates important moral disagreements in a way that (unfortunately) encourages balkanized identity-group politics and moral relativism, and generally suggesting that 'tolerance' is a more problematic social concept than generally recognized). Such "tolerance" may perhaps be better than some options—clearly, it is better than literal all-out religious war (which was perhaps closer to the possibility that concerned Locke)—but it is worse than other possibilities, including the one of a society of truly open discussion.